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No. .....

IN THE

Supreme Court of the United States

October Term, 1980

NORMAN H. SHILLING,

Appellant,

—v.—

STATE COMMISSION ON JUDICIAL CONDUCT,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

March 16, 1981

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JURISDICTIONAL STATEMENT

Norman H. Shilling appeals from a final judgment of the Court of Appeals of the State of New York dated November 25, 1980, and adhered to on motion for reargument on December 17, 1980, removing him from office as a Judge of the Civil Court of the City of New York, pursuant to Article VI, Section 22 of the New York State Constitution. The grounds for Judge Shilling's appeal to this Court are that Article VI, Section 22, on its face and as applied to him, has operated to deprive him of the due process of law guaranteed to him by the Fourteenth Amendment to the United States Constitution.

Question Presented

Whether Article VI, § 22 of the New York State Constitution, permitting the Court of Appeals to impose a harsher sanction upon a judge appealing a determination of the State Commission on Judicial Conduct, and posing a potential and actual threat of vindictiveness, is, on its face and as applied to the appellant, repugnant to the Due Process Clause of the Fourteenth Amendment.

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The Opinions Below and Prior Orders

The decision of the New York Court of Appeals removing Judge Shilling from office is not as yet reported and appears at A 1-13.[1] That court's decision granting Judge Shilling's motion for reargument and, treating it as one for reconsideration, adhering to its prior opinion and denying a stay, is as yet unreported and appears at A 14. The order of Associate Judge Bernard S. Meyer of that court denying Judge Shilling's application for a stay appears at A 15. The order of Associate Justice Thurgood Marshall granting a stay appears at A 16.

Jurisdiction of this Appeal

This is an appeal from a decision of the Court of Appeals of the State of New York dated November 25, 1980, ordering appellant Shilling removed from office as a judge of the Civil Court of the City of New York, effective December 31, 1980 (A 1-13).

On December 17, 1980 the Court of Appeals granted Judge Shilling's motion for reargument, and treating it as a motion for reconsideration, denied it, as well as Judge Shilling's motion for a stay, stating that it was "adhering" to its original determination and that:

> A question under the Constitution of the United States, viz: whether petitioner was denied due process of law by this Court's decision, was raised and necessarily passed on by this Court.

(A 14).

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[1] References to documents reproduced in the Appendix to this Jurisdictional Statement are indicated as "A—", with approriate page number(s) inserted.

Judge Shilling's Notice of Appeal to this Court was filed in the New York Court of Appeals on December 23, 1980. A copy of the Notice of Appeal appears at **A 17.**[2]

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1257(2), the New York Court of Appeals having upheld the validity of Article VI, § 22 of the New York State Constitution over Judge Shilling's objections that that provision, on its face and as applied to him, was repugnant to the Due Process Clause of the Fourteenth Amendment. *Hicks* v. *Miranda*, 422 U.S. 332, 343-44 (1975); *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 605 (1975).[3]

That, owing to the particular nature of New York's judicial disciplinary procedures, discussed below, Judge Shilling did not assert the federal question presented here until moving for reargument before the Court of Appeals is of no moment. Upon granting Judge Shilling's motion for reargument, and treating it as one for reconsideration, the Court of Appeals, "adhering" to its original determination, specifically stated in its opinion that it had considered and passed on that federal question. (A 14).

The appellate jurisdiction of this Court is, therefore, properly invoked. *Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979), quoting *Manhattan Life Insurance Co.* v. *Cohen*, 234 U.S. 123, 134 (1914); *Cox Broadcasting Corp.* v.

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[2] On December 29, 1980, Justice Marshall signed an order granting a stay of execution and enforcement of the judgment of the Court of Appeals, pending the docketing and disposition of this appeal (A 16). A previous application for a stay had been denied by Associate Judge Bernard S. Meyer of the New York Court of Appeals on December 17, 1980 (A 15).

[3] A State constitutional provision is a "statute" within the meaning of 28 U.S.C. § 1257(2). *Torcaso* v. *Watkins*, 367 U.S. 488, 489 (1961); *Adamson* v. *California*, 332 U.S. 46, 48 n.2 (1947); *Railway Express Agency, Inc.* v. *Virginia*, 282 U.S. 440 (1931).

Cohn, 420 U.S. 469, 476 (1975). *Accord, Payton* v. *New York*, 445 U.S. 573, 582 n. 19 (1980); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959); *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182, 185-86 (1945); *see, Allenberg Cotton Company, Inc.* v. *Pittman*, 419 U.S. 20, 23 n. 2 (1974).

Constitutional Provisions and Statutes Involved

United States Constitution, Fourteenth Amendment, § 1, appears at A 18.

New York State Constitution, Article VI, § 22, appears at A 19-22.

Statement of the Case

Appellant Norman H. Shilling is an elected judge of the Civil Court of the City of New York[4] against whom charges of misconduct were brought before the New York State Commission on Judicial Conduct (the "Commission") under the judicial disciplinary procedures established by Article VI, § 22 of New York State Constitution and the statutory framework implementing that provision (N.Y. Judiciary L. §§ 40-48 [McKinney 1978]). That court exists by virtue of Article VI, § 15 of the New York State Constitution, which provides that Civil Court judges shall be elected to office for a term of ten years. A judge so elected is to serve his term in office unless removed for cause in accordance with Article VI, § 22 of the State Constitution, and the procedural machinery that has been created to implement that section.

Disciplinary proceedings against Judge Shilling commenced when he was served with a Formal Written Com-

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[4] Judge Shilling was elected to the Civil Court in 1974.

plaint dated June 4, 1979, alleging that he had improperly interfered in the course of a proceeding before another judge and that he had lent the prestige of his office to advance the interests of the Associated Humane Societies of New Jersey, a not-for-profit corporation of which he was a director. Judge Shilling filed an answer to these charges dated June 22, 1979.

The Commission thereupon designated a referee to hear and report. The referee's report, filed with the Commission on January 23, 1980, contained various findings of fact and a conclusion that Judge Shilling had violated provisions of the Rules Governing Judicial Conduct and Canons of the Code of Judicial Conduct.

Article VI, § 22(a) provides that in hearing a charge of judicial misconduct, the Commission "may determine that a judge . . . be admonished, censured or removed from office for cause . . . " (A 19). On April 9, 1980 the Commission issued a Written Determination that certain of Judge Shilling's off-the-bench conduct, which it found improper in a number of respects, warranted the sanction of censure. The Commission's Determination was unanimous.

Exercising the right provided by Article VI, § 22(a), Judge Shilling appealed the Commission's Determination to the New York Court of Appeals. Article VI, § 22(d) provides that in hearing a judge's appeal from a determination of the Commission, the Court of Appeals "shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based" and "may impose a less or more severe sanction . . . than the one determined by the commission, or impose no sanction." (A 21).

On November 25, 1980 the Court of Appeals issued an opinion in which it confirmed the Commission's findings and conclusions except as to sanction. As to sanction, the

Court of Appeals ordered that Judge Shilling be removed from the bench, rather than censured, as the Commission had determined. In increasing the sanction from censure to removal, the Court of Appeals stressed what it viewed to be Judge Shilling's lack of contrition and his "continued insistence," on appeal, on his innocence:

> Compounding those four separate instances of impropriety . . . is petitioner's continued insistence that his actions involved neither impropriety nor the appearance of impropriety.

(A 6-7).

By operation of Article VI, § 22(h), the court's order of removal forever disqualified Judge Shilling from holding State judicial office in New York.

The sanction of removal was imposed by the Court of Appeals although

> [n]ot a single one of those who officially . . . participated in the investigations and determinations, or in the personal confrontations on which they were based, expressed the opinion that the nature of respondent's improprieties warranted . . . judicial beheading . . . .

Dissenting opinion of Fuchsberg, J., at A 7. Included among those who felt that censure was adequate punishment for Judge Shilling's "overzealous conduct on behalf of an eleemosynary institution which, in [his] private life, he had long served as a devoted trustee" (*Id.*, at A 9), were the attorney for the Commission on Judicial Conduct who actually prosecuted the case,[5]

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[5] The Commission's attorney, who had presented the case against Judge Shilling, referred to him as a "person of integrity" who had given testimony which was "credible from the very beginning of this case". *See*, dissenting opinion of Fuchsberg, J., at A 7-8.

the eleven members of the Commission ("each a distinguished jurist, lawyer or layperson, and each experienced in hearing and deciding such matters") (*Id.*, at A 8), and the Commission's Administrator, who recommended affirmance of the lesser sanction to the Court of Appeals (*Id.*).

Despite this unanimity of opinion within the line agency charged with disciplining judges, and notwithstanding the laudatory testimony before the Commission of Judge Shilling's 56 character witnesses (most of whom were judges and one of whom was the Administrative Judge of the court on which Judge Shilling sits) (*Id.*), the Court of Appeals found from the same record made before the Commission that removal was the appropriate penalty for Judge Shilling's indiscreet conduct. This despite the absence of any intimation that the incident in question either had "interfered with the proper conduct of Judge Shilling's judicial duties" or had involved "venality or personal gain or any other mean, selfish or dishonorable impulse" (*Id.*, at A 9).

Because the Commission, of course, did not urge the Court of Appeals to impose a harsher sanction than that imposed by the Commission, there was no argument before the court on the appropriateness of increasing the penalty.[6]

The Question Presented Is Substantial

I. Introduction

Beginning with California in 1960, virtually all of the States have, in the last two decades, adopted constitutional amendments and statutes creating permanent

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[6] The manner in which the question sought to be reviewed was raised below and the way in which it was passed on by the Court of Appeals are set forth at p. 2, *ante*.

machinery for disciplining their judiciaries.[7] Congress recently followed suit, passing the federal Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which establishes a Court on Judicial Conduct to review disciplinary measures taken by the judicial councils. Pub. L. No. 96-458. The American Bar Association, synthesizing the approaches of the various States, adopted standards relating to judicial discipline on February 14, 1978.[8]

All of these measures, reflecting a perceived demand for accountability on the part of public officials, including judges,[9] were efforts to create mechanisms for judicial discipline more practical than the cumbersome and ponderous procedure of impeachment.[10]

The significance of this case is twofold. First, at issue is the right of a State, in the context of a judicial disciplinary procedure, to place a price—the risk of loss of elective judicial office—upon the exercise of a statutory right to obtain appellate review. Second, because Article VI, § 22, on its face and as applied to Judge Shilling,

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[7] These laws are catalogued in the Appendix to this Court's opinion in *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 846-48 (1978). Mississippi enacted legislation on April 25, 1980 which created a Commission on Judicial Performance (Miss. Code §§ 9-19-1, *et seq.*), leaving but two States which lack permanent, institutionalized mechanisms for enforcing judicial discipline. The variety of these mechanisms is discussed at pp. 16-18, *post*.

[8] ABA STANDARDS RELATING TO DISCIPINE & DISABILITY RETIREMENT NOS. 1.1-9.4 (1978).

[9] *See*, I Kaufman, "Lions or Jackals: The Function of a Code of Judicial Ethics," 35 LAW & CONTEMP. PROB. 3, 4 (1970).

[10] The various States early adopted the federal model of judicial independence, checks and balances, and removal from office only through impeachment. *See*, S. Ervin, Jr., "Separation of Powers: Judicial Independence," 35 LAW & CONTEMP. PROB. 108, 112-14 (1970); E. Schoenbaum, "A Historical Look at Judicial Discipline," 54 CHI.-KENT L.REV. 1, 5-8 (1977).

allows for the realistic possibility of a vindictive increase in sanction *because* a judge has appealed, it must be determined whether the proscription against such vindictiveness in criminal cases (*e.g.*, *North Carolina* v. *Pearce*, 395 U.S. 711 [1969]; *Blackledge* v. *Perry*, 417 U.S. 21 [1974]) extends to quasi-criminal disciplinary proceedings.

It is important that this Court give guidance, where necessary, to the States in their burgeoning efforts to attain judicial accountability.

> The more relaxed standards of yesterday are no longer acceptable. But this relatively abrupt change in attitude creates problems. As a result of this new zeal for a higher ethic in performance of the judicial function, some judges are charged with wrongdoing where there is no fault by any standard, and others are held responsible for failure to meet a standard never before demanded, and only now in the process of formulation.

R. McKay, "The Judiciary and Nonjudicial Activities," 35 LAW & CONTEMP. PROB. 9 (1970). Where the State's efforts to create judicial disciplinary procedures have impinged on constitutionally protected rights, this Court has not hesitated to intervene. *E.g.*, *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 841 (1978). New York has an undeniably compelling interest in maintaining the integrity of its judiciary. That goal cannot, however, be pursued through regulations or procedures which derogate from federally protected interests. *E.g.*, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975).

In order to resolve the substantial federal questions presented in this case, it is respectfully submitted that the Court should note its probable jurisdiction.

II. The Appellate Structure Created By Article VI, § 22, Authorizing The Imposition Of An Increased Sanction Only Upon Those Judges Who Seek Review, Poses The Inherent And Realistic Likelihood Of Vindictiveness And, On Its Face And As Applied, Violates Due Process Of Law.

A. The Article VI, § 22 Appellate Mechanism Is, On Its Face, Violative of the Fourteenth Amendment

This Court "has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966) (citations omitted).

In a line of cases that began with *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), the Court has held that an appellate structure which poses the "realistic likelihood" that one who has been sanctioned and appeals will have a harsher sanction imposed upon him for having exercised the right of appeal is violative of the Due Process Clause of the Fourteenth Amendment. *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974).[11]

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[11] In *Blackledge*, the harsher sanction consisted of additional time to be spent in prison. The Due Process Clause, however, in protecting "life, liberty, and property", does not restrict its coverage to those whom the State wishes to incarcerate. It cannot seriously be doubted that Judge Shilling's expectancy of continued employment as a Civil Court judge (a position created by the New York Constitution, filled by election, having a ten-year term, and terminable only for cause) is a property right cognizable under the Due Process Clause. *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975); *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972); *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 577 (1972).

[Footnote continued on following page]

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

North Carolina v. *Pearce, supra*, 395 U.S. at 725.

As was said in *Board of Regents of State Colleges* v. *Roth, supra*, 408 U.S. at 572, "deprivations of liberty beyond the sort of formal constraints imposed by the criminal process" are guaranteed due process protection. By publishing in detail its reasons for taking the drastic step of ordering his removal, *see* N.Y. Times, November 26, 1980, p. A1, N.Y. Law Journal, November 26, 1980, p. 1, the Court of Appeals impugned Judge Shilling's "good name, reputation, honor, or integrity", which stigma, when accompanied with a "loss of government employment", necessarily implicated liberty interests comprehended within the Due Process Clause. *Paul* v. *Davis*, 424 U.S. 693, 706 (1976); *Board of Regents of State Colleges* v. *Roth, supra*, 408 U.S. at 573; *see also, Wisconsin* v. *Constantineau*, 400 U.S. 433, 437 (1971). Furthermore, because—by operation of Article VI, § 22(h)—Judge Shilling's removal disables him from ever holding future judicial office in New York, another recognized "liberty" right, protected by due process, is affected. *Board of Regents of State Colleges* v. *Roth, supra*, 408 U.S. at 573; *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123, 185 (1951) (Jackson, J., concurring).

It is well-recognized that disciplinary proceedings must be conducted in a manner consistent with due process, whether they pertain to attorneys (*In re Ruffalo*, 390 U.S. 544, 550-51 [1968]; *Erdmann* v. *Stevens*, 458 F.2d 1205, 1208-10 [2d Cir. 1972]) or to judges (*In re Hanson* 532 P.2d 303, 305 [Alas. 1975]; *In re Kelly*, 238 So.2d 565, 569 [Fla. 1970]; *In re Haggerty*, 257 La. 1, 241 So.2d 469, 479 [1970]; *In re Diener*, 268 Md. 659, 304 A.2d 587, 597-98 [1973]; *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246, 251 [1977]).

That it is not actual subjective vindictiveness on the part of a sanction-imposing authority, but rather a reasonable possibility of retaliation inherent in a particular appellate structure, that gives rise to the constitutional infirmity has been made entirely clear by the cases.

> There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that 'since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.'

Blackledge v. *Perry*, *supra*, 417 U.S. at 28. *See*, *United States* v. *Floyd*, 519 F.2d 1031, 1034 (5th Cir. 1975).

"Vindictiveness" in this context connotes the retaliatory placing of a price on the exercise of a right; it does not imply or require the presence of personal animosity on the part of the sanction-imposing authority. *Id.*

In the three cases in the *Pearce* line where this Court found no due process violation,[12] it did so either because there did not inhere in the procedural structures under examination a realistic possibility of vindictiveness or because the potential for vindictiveness was inevitable and indispensable to the attainment of a paramount goal of the criminal justice system (*viz.*, the negotiation of plea bargains).

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[12] *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978); *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973); *Colten* v. *Kentucky*, 407 U.S. 104 (1972).

In *Colten* v. *Kentucky*, 407 U.S. 104, 117-18 (1972), the Court said:

> The trial *de novo* represents a completely fresh determination of guilt or innocence. It is not an appeal on the record. As far as we know, the record from the lower court is not before the superior court and is irrelevant to its proceedings. In all likelihood, the trial *de novo* court is not even informed of the sentence imposed in the inferior court and can hardly be said to have 'enhanced' the sentence.

The review provided by Article VI, § 22(d) of the New York Constitution stands in sharp contrast. That section requires that the review be *solely* on the record below, and the Court of Appeals is necessarily made aware of the sanction imposed by the Commission. In fact, § 22(d) expressly authorizes the Court of Appeals to modify the Commission's determination on sanction by raising or lowering it. While a higher sanction imposed by a different trial forum following a new trial may be happenstance, a greater sanction imposed on a judge by the Court of Appeals can flow only from the court's knowledge—and disapproval—of the sanction imposed by the Commission. The possibility that the Court of Appeals will impose a harsher sanction than did the Commission because of its vexation with what it perceives to be a meritless, time-consuming appeal is a possibility built into the structure of § 22, and one which cannot be ignored.

This Court's analysis in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), further highlights the potential for vindictiveness inherent in § 22. Holding that a Georgia system, in which juries imposed sentences, did not violate due process because in a "properly controlled retrial" "there is no basis for holding that jury resentencing poses any real threat of vindictiveness," the Court placed em-

phasis not only on the second jury's lack of knowledge of the sentence imposed by the first jury,[13] but on a jury's lack of interest in those institutional values which might motivate judges toward "vindictiveness" against appellants:

> Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging appeals.

Id. at 27.

Surely, one could not say that the New York Court of Appeals lacks institutional interests in discouraging appeals that burden its already crowded docket—especially appeals it perceives as meritless, brought by judges (1) who ought to know better and (2) who embarrass other judges by insisting on pressing meritless points concerning their improper conduct.

In *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court declined to find that any due process violation arose from a prosecutor's fulfillment of a threat to seek a more severe indictment against a defendant manifesting an unwillingness to plead guilty. The Court reasoned that in the give-and-take of negotiating a plea bargain, which is a central feature of our criminal justice system, there inevitably (and, therefore, permissibly) is pressure upon a criminal defendant to relinquish his right to a trial. 434 U.S. at 362-65. With respect to the appellate structure under consideration here, however, it simply is neither inevitable nor even necessary that the Court of Appeals should be able to impose an enhanced sanction only upon those judges availing themselves of the right

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[13] "The first prerequisite for the imposition of a retaliatory penalty is knowledge of the prior sentence." 412 U.S. at 26.

to obtain review. Because New York could readily have designed its appellate structure otherwise (*see*, pp. 18-20, *post*), the substantial chilling effect inherent in the review provisions of Article VI, § 22(d) is unnecessary and, therefore, impermissible. *United States* v. *Jackson*, 390 U.S. 570, 582 (1968).

B. The Chilling Effect Inherent In Article VI, § 22 Is Both Substantial and Unnecessary to the Attainment of Any Legitimate Objective; It, Therefore, Places An Unconstitutional Burden Upon Due Process Rights

The cases that have developed and elaborated upon the doctrine originally enunciated in *North Carolina* v. *Pearce*, *supra*, have emphasized that the deterrent or "chilling" effect inherent in the knowledge that appealing may ultimatly result in the imposition of a harsher sanction will not, by itself, render a statutory scheme violative of due process. *E.g.*, *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 29. There is no absolute constitutional bar to the imposition of a more severe sanction upon retrial or appeal. *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 723. What is violative of due process is a structure which deters or "chills" one from exercising a right of appeal for fear that a harsher sanction may be imposed upon him because he has appealed. While due process is not violated by the theoretical existence of an increased sanction for one who appeals, it is violated if the increased sanction is vindictively imposed; or if the appellate structure allows for the realistic possibility that a vindictive sanction will be imposed; or if putative appellants are deterred from appealing by apprehension that vindictive sanctions may be imposed on them. *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 725; *Colten* v. *Kentucky*, *supra*, 407 U.S. at 116; *Chaffin* v. *Stynchcombe*, *supra*, 412 U.S. at 25; *Blackledge* v. *Perry*, *supra*, 417 U.S. at 28.

The "chilling" effect upon the appellate rights of judges who have been sanctioned by the Commission is made real because of the peculiar operation of § 22; it arises not from apprehension of a theoretical, neutrally-determined, increased sanction, but from fear of a punitively-increased sanction for having had the temperity to appeal. Given Judge Shilling's experience,[14] it will be interesting indeed to see how many judges censured or admonished by the Commission will risk removal and permanent disqualification from holding judicial office as the price for an effort to remove the unpleasant, but non-career-threatening stigma of censure or admonishment. It is particularly anomalous that only those judges, like Judge Shilling, upon whom the Commission has imposed the lesser sanctions of admonishment or censure, will be chilled in exercising their right to appellate review. Those who, unlike Judge Shilling, have been found guilty of morally reprehensible or criminal conduct and have been ordered removed from office by the Commission obviously will face no disincentive to appealing. *Cf. Elfbrandt* v. *Russell*, 384 U.S. 11, 18 (1966).

Whenever the Government chills or deters one from exercising a basic right,[15] the governmental purpose that results in the deterrence, as well as the means by which that purpose is effectuated, are subject to scrutiny:

> Whatever might be said of Congress' objectives they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights. . . .

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[14] Judge Shilling was apparently the first judge upon whom the Court of Appeals imposed an increased sanction under Article VI, § 22. Cf., the dissenting opinion of Fuchsberg, J., at A 13.

[15] As pointed out at p. 9, *ante*, the right of appeal, although created by statute (or in this case by the New York State Constitution), once created must be free and unfettered. *Rinaldi* v. *Yeager*, *supra*, 384 U.S. 305; *Draper* v. *Washington*, 372 U.S. 487 (1963); *Lane* v. *Brown*, 372 U.S. at 477 (1963); *Douglas* v. *California*, 351 U.S. 12 (1956); *Worcester* v. *Comm'r*, 370 F.2d 713 (1st Cir. 1966).

> The question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive.

United States v. *Jackson*, 390 U.S. at 582 (citations omitted).

There would seem to be two possible objectives underlying the review provisions of Article VI, § 22. By providing for a review by the Court of Appeals of the Commission's determinations, with the court having authority to modify a sanction upward or downward, the policy being articulated could be one of having the State's highest court be the final decision-maker in that important class of cases involving the disciplining of judges. Mandatory review of *all* Commission determinations, with power to raise or lower sanctions, would fulfill such a policy and would be constitutionally sound.

Providing, however, for review of only those cases appealed by judges dissatisfied with the Commission's determinations, and providing that only in those cases may the court increase the sanction determined by the Commission, does not implement a policy of high court review and ratification of all disciplinary decisions. Instead, it creates the appearance, and the possibility, that a price—exposure to increased sanctions—is being exacted that is entirely unnecessary to achievement of any legitimate policy of the State.[16]

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[16] The first permanent State commission on judicial conduct was established, in 1960, by California. CAL. CONST. art 6, § 18; CAL.CT.R. 901-922. More than thirty States have followed California's pioneering lead, enacting virtually identical provisions and taking guidance from the decisions of the California Supreme Court. E. Schoenbaum, "A Historical Look at Judicial Discipline", 54 CHI.-KENT L. REV. 1, 20-22 & Table I at 24-27 (1977); *In re Diener*, 268 Md. 659, 304 A.2d 587, 589 (1973); *Matter of Mikesell*, 396 Mich. 517, 243 N.W.2d 86, 90 (1976); *Matter of*

[Footnote continued on following page]

Buford, 577 S.W.2d 809, 813, 815-18, 820 (Mo. 1979); *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246, 253 (1977).

Under the California model, the Commission acts as an "arm of the court", making a "recommendation" which the state supreme court is free to accept, modify, or reject. The Commission itself cannot impose discipline; only the supreme court can do that. *Keiser* v. *Bell*, 332 F. Supp. 608, 621 (E.D. Pa. 1971); *Geiler* v. *Commn' on Judicial Qualifications*, 10 Cal. 2d 270, 276, 110 Cal. Rptr. 201, 204, 515 P.2d 1, 4 (1973); *In re Kelly*, 238 So.2d 565, 569, 571 (Fla. 1970); *In re Inquiry Relating to Rome*, 218 Kan. 198, 542 P.2d 676, 684 (1975); *In re Haggerty*, 257 La. 1, 241 So.2d 469, 472 (1970); *Matter of Del Rio*, 400 Mich. 665, 256 N.W.2d 727, 736 (1977); *Matter of Buford*, 577 S.W.2d 809, 815 (Mo. 1979); *In re Nowell*, 293 N.C. 235, 237 S.E.2d 246, 252 (1977); *In re Brown*, 512 S.W.2d 317, 320 (Tex. 1974). Because the Commission's recommendation is advisory only, the review by the state supreme court is not an appeal; it is, rather, the initial and sole determination having binding legal effect. *Matter of Buford*, *supra*, 577 S.W.2d at 815; *In re Douglas*, 382 A.2d 215 (Vt. 1977).

Pursuant to Cal. Ct. Rule 919(b), the California Supreme Court may reject or "modify" the Commission's recommended sanction. The California Supreme Court has explicitly reserved decision whether it can, under State law, "modify" a recommendation by increasing the proposed sanction. *Spruance* v. *Comm'n on Judicial Qualification*, 13 Cal.3d 778, 119 Cal. Rptr. 841, 532 P.2d 1209, 1213, n.5 (1975). The same question remains open under the law of Michigan, a jurisdiction having a disciplinary system modeled after California's. J. Gillis and E. Fieldman, "Michigan's Unitary System of Judicial Discipline: A Comparison with Illinois' Two-Tier Approach", 54 CHI.-KENT L.REV. 117, 118, 128, n.74 (1977).

Other jurisdictions with disciplinary mechanisms patterned after California's have concluded, as a matter of State law, that the imposition of an enhanced penalty is permissible. *In re Robson*, 500 P.2d 657, 660-61 (Alas. 1972); *In re Diener*, 268 Md. 659, 304 A.2d 587, 600-01 (1973); *In re Douglas*, 382 A.2d 215, 218-19 (Vt. 1977); *cf.*, ABA Standards Relating to Judicial Discipline & Disability Retirement, Stand. 7.11 (1978) (approving this practice). No reported decision appears to have assessed this procedure against Federal Constitutional standards.

New York's system differs from the California model in that: (1) an increased penalty is made explicitly available (N.Y. CONST. art VI, § 22); and (2) the review by the New York

[Footnote continued on following page]

The second legitimate policy that the State might seek to fulfill in the § 22 review procedures is to provide judges dissatisfied with the Commission's determinations an opportunity to have them reviewed by the court.[17]

Court of Appeals is from a determination (not a recommendation) which itself has binding legal effect. A recommendation by a California-type commission, on the other hand, is advisory rather than self-effectuating. A judge who fails within thirty days to petition the California Supreme Court for review of the Commission's recommendation will, however, be deemed to have consented to that proposed sanction. CAL. CT. R. 919(c). Assuming that an enhanced sanction is possible (*but see, Spruance, supra*), this provision might therefore be vulnerable on the same grounds as is New York's.

[17] That this is indeed a goal of Article VI, § 22 has been suggested by the Administrator of New York's Commission on Judicial Conduct. *See*, G. Stern, "New York's Approach to Judicial Discipline: the Development of a Commission System," 54 CHI.-KENT L.REV. 137, 144 (1977).

New York has long had constitutional and statutory mechanisms for disciplining judges other than by impeachment. By a constitutional amendment adopted on November 8, 1977 and effective on April 1, 1978, New York significantly altered these mechanisms. It was under this new disciplinary scheme that the charges against Judge Shilling were brought and adjudicated.

Prior to April 1, 1978, the Commission had limited disciplinary powers—it could censure, suspend and retire judges for disability. The Commission's determination, however, was subject to a judge's right to receive a *de novo* hearing in the Court on the Judiciary, a specially-constituted court convened on a case-by-case basis. N.Y. CONST. Art. VI, § 22 (1961) (amended 1977). There was no right to appeal from the Court on the Judiciary to the New York Court of Appeals.

The 1978 constitutional amendment establishing the present disciplinary system was, in part, designed to cure the unwieldly and time-consuming procedures entailed in duplicative hearings before the Commission and the Court on the Judiciary. *See*, G. Stern, *supra*, 54 CHI.-KENT L.REV, at 144. That amendment eliminated the Court on the Judiciary, placed full investigative and adjudicatory functions in the hands of the Commission, increased the range of sanctions which could be imposed by the Commission (by adding that of removal), and, for the first time, provided for an appeal as of right to the New York Court of Appeals.

Structurally, and as evidenced by the result in this case, however, the review provisions of § 22 fulfill no such purely ameliorative function. Section 22 specifically enables the Court of Appeals to increase the Commission's sanction if the judge appeals; such an enhanced penalty, moreover, is possible only if the judge appeals.[18]

Again, this looks quite simply like a price being placed on the exercise of the right of review which is logically unrelated to the fulfillment of the policy sought to be effectuated.

Because the chilling effect created by the review provisions of Article VI, § 22 is entirely unnecessary to the achievement of any legitimate purpose of the State, it is excessive and a violation of due process of law. *Cf. Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

C. The Constitutional Prohibition Against The Existence of Actual or Potential Vindictiveness in Appellate Procedures Applies to Quasi-Criminal Disciplinary Proceedings

The *Pearce/Blackledge* line of decisions does no more than apply, in a criminal context, the hoary stricture against conditioning the grant of a right or privilege (*e.g.*, the right to appeal) upon the relinquishment of a right (*e.g.*, the right not to be deprived of property or liberty without due process of law). This doctrine of

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[18] At least two jurisdictions have provided for appellate review without giving the reviewing court power to increase sanctions. *See* Ala. Const. Amdt. No. 328 (1973); *Matter of Samford*, 352 So.2d 1126, 1128-29 (Ala. 1977); D.C. Code, § 11-1529 (1973); *Halleck* v. *Berliner*, 427 F. Supp. 1225, 1250 (D. D.C. 1977) (*semble*). Compare the Illinois system, which provides for no appellate review but has a separate Judicial Inquiry Board (which investigates and prosecutes) and Courts Commission (which punishes). ILL. CONST. art. VI, §§ 15(b), (e) (1970).

"unconstitutional conditions" was first enunciated in *Insurance Co.* v. *Morse*, 87 U.S. (20 Wall.) 445 (1874). As articulated in *Frost* v. *Railroad Commission*, 271 U.S. 583, 593-94 (1926):

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Accord: *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 256-60 (1974); *Goldberg* v. *Kelly*, 397 U.S. 254, 261-63 (1970); *Shapiro* v. *Thompson*, 394 U.S. 618, 642-44 (1969) (Stewart, J., concurring); *Sherbert* v. *Verner*, 374 U.S. 398, 403-06 (1963); *Spieser* v. *Randall*, 357 U.S. 513, 518-20 (1958); *Midwest Video Corp.* v. *Federal Communications Commission*, 571 F.2d 1025, 1050-52 (8th Cir. 1978); *Wojtczak* v. *Cuyler*, 480 F. Supp. 1288, 1304-06 (E.D. Pa. 1979); *Parrish* v. *Civil Service Commission*, 66 Cal. 2d 260, 57 Cal. Rptr. 623, 425 P.2d 223, 230-31 (1967); *see also*, L. Tribe, *American Constitutional Law*, 510 (1978); Van Alstyne, "The Demise of the Right-

Privilege Distinction in Constitutional Law", 81 HARV. L. REV. 1439, 1445-49 (1968); Note, "Unconstitutional Conditions", 73 HARV. L. REV. 1595, 1599-1600 (1960).

In enacting a judicial disciplinary scheme, New York did not have to provide for appellate review of sanctions imposed by the disciplinary agency. Alternatively, New York could have provided for automatic appellate review—with the possibility of enhanced sanctions—in all cases decided by the disciplinary agency. What New York could not permissibly do was to condition a judge's access to appellate review upon his putting at risk his constitutionally-protected property and liberty interests. Such a scheme unnecessarily and substantially injects into the appellate procedure the vindictiveness feared in *Pearce* and *Blackledge*.

To be sure, *Pearce* and *Blackledge* involved appeals from criminal convictions. In holding those cases applicable here, however, this Court need not reach the question whether the *Pearce/Blackledge* line applies to all civil litigation. A disciplinary proceeding is clearly "quasi-criminal" in nature (*In re Ruffalo*, 390 U.S. 544, 551 [1968]; *Erdmann* v. *Stevens*, 458 F.2d 1205, 1209 [2d Cir. 1972]; *In re Haggerty*, 257 La. 1, 241 So.2d 469, 479 [1970]), and the sanction (removal) imposed upon Judge Shilling by the New York Court of Appeals certainly constitutes "punishment". *Ex Parte Garland*, 71 U.S. 33, 370 (1866); *Cummings* v. *Missouri*, 71 U.S. 277, 327 (1866); *Keiser* v. *Bell*, 332 F. Supp. 608, 621-22 (E.D. Pa. 1971) (within the meaning of the prohibition against *ex post facto* laws).[19]

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[19] That the punishment which unconstitutionally burdens Judge Shilling's due process property and liberty interests is not incarceration is immaterial. *Elrod* v. *Burns*, 427 U.S. 347, 358-60 (1976); *Board of Regents of State Colleges* v. *Roth*, *supra*, 408 U.S. at 572.

This Court has, on other occasions, applied doctrines evolved in the context of criminal prosecutions to quasi-criminal State proceedings to which the State was a party. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 604-05 (1975); *cf., Trainor* v. *Hernandez*, 431 U.S. 434, 448-49 (1977) (Blackmun, J., concurring).[20]

The applicability of *Pearce/Blackledge* in a quasi-criminal context has, indeed, been recognized. *See, Dan J. Sheehan Co.* v. *Occupational Safety & Health Review Commission*, 520 F.2d 1036 (5th Cir. 1975), *cert. denied*, 424 U.S. 965 (1976); *cf., United States* v. *Litton Systems, Inc.*, 573 F.2d 195, 198-200 (4th Cir. 1978); *Clarkson Construction Co.* v. *Occupational Safety & Health Review Commission*, 531 F.2d 451, 456 (10th Cir. 1976); *In re Hawkins*, 17 N.C. App. 378, 194 S.E.2d 540, 549-50, *appeal dismissed*, 283 N.C. 393, 196 S.E.2d 275, *cert. denied*, 414 U.S. 1001 (1973).[21]

In *Dan J. Sheehan Co., supra*, involving the imposition of fines under the Occupational Safety and Health Act of 1970 ("OSHA"), the Fifth Circuit sustained the constitutionality of an OSHA enforcement mechanism against a challenge based upon *Pearce/Blackledge*, but it did so only after finding safeguards in those procedures that have no counterpart in Article VI, § 22 of New York's Constitution. There, an employer contended that it was subject to an "OSHA chill," by virtue of the power of the Occupational Safety and Health Commission to in-

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[20] The proposition that vindictiveness has no place in a regulatory or disciplinary mechanism is hardly startling. *Oestereich* v. *Selective Serv. Sys.*, 393 U.S. 233, 237 (1968); *West Virginia Judicial Inquiry Comm'n* v. *Casto*, 263 S.E.2d 79, 83 (W. Va. 1979).

[21] In *Litton* and *Clarkson*, no vindictiveness was found. In *Hawkins*, there was, in fact, no increase in the penalty after appeal. All three courts, however, treated *Pearce/Blackledge* as being applicable.

crease a penalty imposed upon an employer by the Secretary of Labor in the event that the employer exercised its right to appeal the Secretary's determination to the Commission. The court reviewed the principles developed in the *Pearce/Blackledge* line and noted that OSHA's knowledge of the Secretary's proposed penalty, when combined with its institutional interest in discouraging employer-initiated appeals from the Secretary's orders, created a potential for vindictiveness. 520 F.2d at 1041. The court, however, found it "decisive" that, under the OSHA procedures, the employer had the opportunity to obtain judicial review by the court of appeals of an increased penalty imposed by the Commission. 520 F.2d at 1041-42.

> If the Commission does not offer any reason for its decision to increase or if there is evidence that the increase was designed to penalize the employer for exercising its right to contest, the court will be in a position to correct such an abuse of discretion. The opportunity for such corrective action by the courts is a sufficient safeguard to allay the fears of employers who might be fearful that a contest of a citation and proposed penalty would hazard increased penalties by way of retribution.

Plainly, it was only the availability of such judicial review that cured the due process infirmities of the OSHA scheme. New York's constitutional scheme, on the other hand, provides no such curative review of an increased sanction imposed on a judge by the New York Court of Appeals, which is the final arbiter of this class of cases and is also the very body in which the institutional potential for vindictiveness lies.

D. The Court of Appeals Applied Article VI, § 22 In A Manner Violative of Due Process of Law

The possibility, inherent in § 22, that a judge, dissatisfied with the disciplinary sanction meted out by the Commission, who appeals the Commission's determination to the Court of Appeals, might subject himself to an enhanced sanction has been realized by Judge Shilling. Had he not appealed the Commission's determination, he would be censured, but would remain a judge of the Civil Court, receiving his salary, retaining the other emoluments of office for the remainder of his ten-year term, and remaining eligible to run for the Civil Court—or another judicial office—at the conclusion of that term. Believing himself unjustly censured, Judge Shilling appealed—and has paid with the loss of his office and permanent disqualification from holding judicial office in New York State.

A singular aspect of the decision of the Court of Appeals is that the court made clear its displeasure with Judge Shilling's insistence on appealing the sanction imposed by the Commission. As noted, at , *ante*, in explaining its determination to increase that sanction, the court explicitly pointed to Judge Shilling's "continued insistence" upon his innocence.

The belief that one's actions are not improper is, presumably, the state of mind that causes an unsuccessful litigant to want to prosecute an appeal from a determination that he has acted improperly. Insistence on that belief is entirely consistent with the decision to take an appeal.

Treating one's continued insistence on his innocence as an element of the conduct warranting imposition of an increased sanction, however, is nothing other than punishing an appellant for appealing. This is the judicial vin-

dictiveness found *hypothetically* present in the *Pearce/Blackledge* line of cases, but never confirmed in those cases by concrete evidence. In this case the Court of Appeals has candidly provided such evidence in its opinion.[22]

This result is particularly undesirable in a proceeding, such as that before the Court of Appeals, in which the appropriateness of an increased penalty—although theoretically available—was not advocated by Judge Shilling's adversary and, hence, not explicitly litigated. Again, it is anomalous that the imposition of an enhanced penalty without the benefit of a sharp and overt dispute on that issue will occur only where, as here, the Commission clearly views the judge's conduct as constituting an infraction of a lesser nature.[23]

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[22] Again, it should be stressed that "vindictiveness" in this context connotes the retaliatory placing of a price upon the exercise of a right; it does not imply or require any finding of personal animus on the part of any of the judges of the Court of Appeals who voted for Judge Shilling's removal.

[23] The conclusion that the increased penalty was imposed because Judge Shilling appealed, and was intended as a warning to other putative appellants, is supported by a comparison of Judge Shilling's offending conduct with that of other judges sanctioned less severely by the Court of Appeals and by the Commission's predecessor, the Court on the Judiciary. *See, e.g.*, dissenting opinion on Fuchsberg, J., at A 12-13; *Matter of Waltemade*, 37 N.Y.2d (a), (vv)-(hhh), 409 N.Y.S.2d 989, 995-1003 (Court on the Judiciary 1975); *Matter of Feinberg*, 39 N.Y.2d (a), (u)-(v), 409 N.Y.S.2d 1007, 1008 (Court on the Judiciary 1976); *Matter of Vaccaro*, 42 N.Y.2d (a), (e)-(g), 409 N.Y.S.2d 1009, 1010-1011 (Court on the Judiciary 1977); *Matter of Richter*, 42 N.Y.2d (aa), (bb)-(ii), 409 N.Y.S.2d 1013, 1020 (Court on the Judiciary 1977).

CONCLUSION

For the foregoing reasons, probable jurisdiction of this appeal should be noted.

Respectfully submitted,

March 16, 1981

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APPENDIX

STATE OF NEW YORK

COURT OF APPEALS

SCJC No. 488

In the Matter of NORMAN H. SHILLING, a Judge of the Civil Court of the City of New York, Kings County,
Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

(488) Stanley D. Steinhaus, Brooklyn, for appellant.
Gerald Stern & Jean Saranyu, NY City, for respondent.

Opinion

This opinion is uncorrected and subject to revision before publication in the New York Reports.

PER CURIAM

A judge whose conduct off the bench demonstrates a blatant lack not only of judgment but also of judicial temperament, and complete disregard of the appearances of impropriety inherent in his conduct, should be removed from office, notwithstanding that his reputation for honesty, integrity and judicial demeanor in the legal community has been excellent. The Commission's findings of fact should be confirmed but its determined sanction of censure should be rejected and the sanction of removal imposed, as hereafter directed.

Petitioner is a judge of the Civil Court, Kings County. He is also a trustee of the Associated Humane Societies of New Jersey (AHS), a not-for-profit corporation which in 1977 was seeking a permit to operate an animal shelter in Kings County. In December 1977, John Esteves, the manager of the AHS shelter, received three summonses, one from the City Department of Health for operating the

Kings County shelter without a permit, and two from the ASPCA for violations relating to health certificates for dogs shipped from New Jersey and to the manner in which certain animals were kept. Other violations were investigated apparently in March or May 1978, and a further summons issued.

In relation to the permit application, petitioner had several telephone conversations with Dr. Alan Beck, Director of the New York City Department of Health, Bureau of Animal Affairs. In these conversations, petitioner identified himself as a judge, inquired why the AHS permit had not been granted and on receiving an explanation became angry and screamed so loudly into the telephone that Dr. Beck could not keep the phone to his ear. He also informed Dr. Beck that he had more political clout than Dr. Beck, and in vulgar language told Dr. Beck he should stop impeding the AHS application. The permit came up also in the courtroom corridor conversation, hereafter detailed, between petitioner and Dr. Howard Levin, Chief Veterinarian of the City Department of Health, when petitioner raised the question why it had not been issued and suggested that "he had people in high places that he hadn't even tapped as yet."

In relation to the summonses, petitioner was called by Esteves at the time the 1978 summons was issued. Esteves then put Dr. Levin, who had just inspected the shelter, on the phone with petitioner. Levin was told by petitioner, in what Levin characterized as a threatening voice, that the Department was abusing its authority. Petitioner also contacted Dr. John Kullberg, Executive Director of the ASPCA, and Eric Plasa, its Law Enforcement Director, in an effort to have the 1977 summonses dropped. Dr. Kullberg declined that suggestion but informed petitioner that the Society would make an unannounced reinspection and inform the court of its results when the vio-

lations came on for trial. Petitioner requested that he be notified in advance of such a reinspection. No reinspection was ever made.

Thereafter, when the Esteves matter came on before Judge Eugene Nardelli in Criminal Court, petitioner sat in the rear of the courtroom, and Judge Nardelli was informed by the AHS attorney, during discussions, that petitioner sat on the AHS Board. After the matter had been adjourned, petitioner approached the bench and commented to Judge Nardelli that if the ASPCA and the Department of Health were really interested in animals, they would not be proceeding as they were. In the corridor outside Judge Nardelli's courtroom there ensued a heated discussion participated in by petitioner, the AHS attorney, Dr. Levin, the ASPCA attorney and two ASPCA officers. All three of the ASPCA personnel testified, as did Dr. Levin, that petitioner was angry, was talking in a loud voice and stated during the conversation both that he was a judge and that he had friends in high places.

The Commission determined that it was improper for petitioner to have attempted to persuade ASPCA officials to withdraw the summonses and to identify himself as a judge while so doing, to interfere with Department of Health officials on behalf of AHS in relation to issuance of a permit, to have identified himself as a judge in so doing and to have addressed those officials in a hostile, profane and loud manner, to have spoken in a loud voice in the public corridor outside the courtroom and referred to his political influence, and to have interfered in the Esteves case by speaking to Judge Nardelli about the case. It concluded that "the blatant impropriety [petitioner] has evinced [is] seriously compounded by his refusal in this record to acknowledge that his actions even appear improper," but nevertheless determined that the appropri-

ate sanction was censure, which was what the Commission Administrator, with some misgivings,* had recommended.

Petitioner denied any intent to influence anyone and testified that as a judge elected as a Reform Democrat in Brooklyn he had no political clout, but never directly denied making the remarks attributed to him. He admitted speaking in emphatic tones, and did not deny the vulgarity attributed to him, saying that he did not remember the exact words and that he could have used another word (a euphemism, which would have conveyed the same meaning). Though he, thus, has not categorically denied the factual basis for the charges, he argues before us, as he did before the Commission, that he was not acting as a judge and gave no appearance of impropriety, that the evidence does not sustain the charges, that the procedures followed were improper and that the Referee improperly ignored the many lawyers and judges who testified to his reputation for integrity, honesty and judicial demeanor.

As in *Matter of Steinberg* (51 NY2d 74, 83), so here, we cannot accept petitioner's "contention that conduct off the Bench may give rise to removal only where there has been some act of overt illegality or extreme 'moral turpitude' ", since "[a]ny conduct, on or off the Bench, inconsistent with proper judicial demeanor subjects the judiciary as a whole to disrespect and im-

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* Immediately following the portion of the Administrator's statement quoted in the second paragraph of the dissent appears the following:

> "But where a judge so totally lacks sensitivity to his obligations, his ethical obligations, and where he acts in such a manner to distort the processes of justice, removal was not and is not out of my mind a question as a recommendation.
>
> "However, there are only two alternatives in my mind, and I recommend public censure."

pairs the usefulness of the individual Judge to carry out his or her constitutionality mandated function" (*Matter of Kuehnel*, 49 NY2d 465, 469). Thus, petitioner's insistence that because he was acting on behalf of a not-for-profit corporation his acts had "nothing to do with my judicial position" is misguided. Equally misguided is the suggestion that general reputation testimony, even though in the numbers and from persons of such standing as testified on petitioner's behalf, make the findings of the Referee and the Commission against the weight of the evidence. As we noted in *People* v *Miller* (35 NY2d 65, 69): "Character evidence does not exist in a vacuum, and its value, influence or the weight to be accorded it depends in great part upon the other evidence in the case. * * * If the evidence of guilt against a defendant is cumulative and reliable, the influence of contrary evidence of good character is likely to be slight. Under other circumstances, such evidence may be so good, if believed, as to create a reasonable doubt where without it none would exist."

After careful review of the record we find the evidence of petitioner's misconduct, which comes not only from other witnesses but from the subjective nature of his defense and his inabiiity to contravert the objective evidences of that misconduct, to be both cumulative and reliable, and find neither reason to disturb the Commission's findings and conclusions concerning that misconduct nor any basis for holding that there was any infirmity in the procedure followed.

We do, however, reject the Commission's determined sanction. We recognize that the power given us by subdivision 9 of Section 44 of the Judiciary Law to do so, is not lightly to be exercised and that the ultimate sanction of removal is not normally to be imposed for poor judgment, even extremely poor judgment (*Matter of Steinberg*, *supra*, at p. 81). The situation with which we deal here is clearly more egregious than that involved in

Matter of Lonschein (50 NY2d 569) where the judge sought special consideration for a license applicant but never asserted his judicial office and did no more than request expedition of the application. Here petitioner, having identified himself as a judge, nevertheless thought it not improper to request the ASPCA, the complaining and prosecuting agency, to cause dismissal of pending charges. He also asked for preferential treatment for AHS, clearly contrary to the spirit and purpose of the regulatory provisions being enforced, by requesting that he be given advance notice of when reinspection might take place. Likewise, he felt it not improper to address a remark to the judge before whom the matter was eventually called and which impugned the motives of ASPCA and the Department of Health in seeking to enforce those regulatory provisions. That it may have been improbable that the same judge would sit when the matter was again called before the court appears, like petitioner's suggestion that he lacks political clout, to be an afterthought which may temper but does not excuse the initial transgression.

Also not improper in petitioner's mind was the threat, made on two separate occasions to Dr. Beck and during the courthouse corridor confrontation, to use political influence to obtain the ends he sought, made in intemperate tones and with the use of vulgarity. That he could be wholly unmindful of the impression that would be made upon others present in that corridor by the spectacle of a person identifying himself as a judge and speaking in loud and threatening tones of his friends in high places strongly suggests a lack of judicial temperament. Not without significance in that respect is the private admonishment of petitioner by the former State Commission on Judicial Conduct in March 1977 for having used profane, vulgar and inappropriate language in open court on several occasions in November 1976.

Compounding those four separate instances of impropriety, as the Commission noted, is petitioner's continued

insistence that his actions involved neither impropriety nor the appearance of impropriety. Judicial office, concerned as it is with concepts of reasonable care, arbitrariness, capriciousness, substantiality of evidence, excessiveness of discipline, involves a large measure of discretion. Public acceptance of the judicial product, however, exemplary on a substantive level, cannot survive the acceptance of such invective and pressure politics as petitioner's conduct suggests. As in *Matter of Steinberg*, *supra*, we conclude "that petitioner's complete insensitivity to the special ethical obligations of Judges [renders] him unfit for judicial service" (51 NY2d at p. 84).

For the foregoing reasons we confirm the Commission's findings and conclusions except as to sanction and direct that petitioner be removed from office as a judge of the Civil Court of the City of New York effective at midnight December 31, 1980, and that, during the period between the date of service upon him of a copy of the order to be entered on this decision and December 31, 1980, petitioner be suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service.

Matter of Shilling v. State Commission on Judicial Conduct—Case No. 488

FUCHSBERG, J. (dissenting):

It is a source of regret that I find it necessary to state my strong objection to the catastrophic consequences which the majority so sweepingly visits on the respondent.

Not a single one of those who officially have participated in the investigations and determinations, or in the personal confrontations on which they were based, expressed the opinion that the nature of respondent's improprieties warranted the judicial beheading ordered today. For instance, the counsel who, exhaustively and meticulously, presented the case on behalf of the Commis-

sion on Judicial Conduct summed up his conclusions in this way: "I regard the respondent, and I say this as an adversary to the Commission, as a person of integrity. His testimony was credible from the very beginning of this case. He cooperated; he told the truth. I think that removal from office would be too harsh a penalty * * *".

So too all eleven members of the Commission, each a distinguished jurist, lawyer or layperson, and each experienced in hearing and deciding such matters, voted, without exception, that the appropriate punishment be public censure. Consonantly, the respondent having elected to appeal to this Court, the brief filed by the Commission's Administrator recommends that we accept the sanction. And, as to the majority's concern that the respondent is not contrite enough, the record shows that he has avowed that, "In the future I will not do it". More *mea culpas* would serve no purpose.

In passing on the sanction, it cannot be unimportant that there is here not even a suggestion that the acts on which these charges were based in any way or at any time interfered with the proper conduct of Judge Shilling's judicial duties. Nor is the unexampled and impressive demonstration of support by the host of 56 character witnesses, most of whom are judges and one of whom is the Administrative Judge of the very Court on which he serves, to be blithely cast aside. It certifies to the respect he has earned for his judicial deportment among those in whose midst he must carry out his public responsibilities day in and day out.[1]

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[1] These appraisals were in the face of the private admonition he had once received some years earlier for courtroom use of "inappropriate" language, a circumstance that appears never to have repeated itself. As the unimpeached judicial testimony indicates, a sense of perspective requires us to also note that the sundial that marked this single blemish did not record the impartiality, industry, wisdom and otherwise excellent temperament that characterized Judge Shilling's judicial performance.

What is involved here essentially is overzealous conduct on behalf of an eleemosynary institution which, in the respondent's private life, he had long served as a devoted trustee. This organization, the Association of Humane Societies of New Jersey, is dedicated to animal welfare. Without gainsaying the lack of sensitivity with which it has been found that the respondent functioned on its behalf on the occasions which precipitated this proceeding, it would seem that a proper balance demands equal acknowledgment that the criticizable conduct was not motivated by venality or personal gain or any other mean, selfish or dishonorable impulse.

There was nothing wrong *per se* in the respondent's participation in the Society's affairs. Jurists do not have to sit in isolated, cloistered, legal splendor, completely detached from responsibilities to the community at large. True, there are boundaries that must be respected, but they are free to live normal lives and to identify themselves with or engage in charitable activities. In fact, the Code of Judicial Conduct (Canon 5 B) expressly permits them to hold officerships and directorships in educational, religious, charitable, fraternal and civic organizations, so long as these activities are not conducted for the economic and political advantage of their members and so long as they do not detract from either the dignity or the performance of judicial office.

It is against this background that we now turn to the misguided conduct out of which this case arose. It started when the Humane Society decided to enlarge the geographical scope of its operations by establishing an animal shelter in Brooklyn. This brought on a flood of licensing, zoning and other objections from the American Society for the Prevention of Cruelty to Animals (ASPCA) and the New York City Department of Health. The Humane Society, justly or unjustly, was convinced that the objections were meritless and had been

fueled by reluctance on the part of the ASPCA, which enjoys limited law enforcement powers in New York City, to abide the intrusion of the New Jersey agency. Be that as it may, when the grant of the license had been delayed inordinately and the ASPCA had issued several summonses against the Humane Society and John Esteves, the employee in charge of its newly-opened Brooklyn facility, it turned to Judge Shilling. As the Humane Society trustee who resided in Brooklyn, he was asked to and, undisputably, though very unwisely, did undertake to communicate with the ASPCA and the Health Department to try to persuade them to cease what he and his colleagues at the Society perceived to be an attempt to destroy the Society's newborn project. Initially, this took the form of the telephone calls to which the majority alludes, and, later, at the behest of the Society's counsel, to his attendance in court, where he was asked to be available, on behalf of the Society, to approve any agreement that might be arrived at between the parties at a conference expected to be held there that day.

There appears to be little question but that the respondent, moved by an obvious passion for the Society's cause, waxed indignant about what he and his colleagues conceived to be the unfair exclusionary tact[i]cs of those in opposition to its Brooklyn inroads, and that, at times, the depth of his irritation, perhaps with some unconscious loss of control and dignity, came through in angry tones. And, in one telephone conversation, he did use an expletive which, while not acceptable in the "polite society" of a by-gone age, regrettably is no longer an uncommon feature of private parlance in the world of today. In the course of the conversations, he suggested that, if the ASPCA were intent on pressing the court proceedings it had started, these could just as well be tested against

the Society without involving the employee as an individual.[2]

In the courthouse episode, though it was indiscreet for him to be there at all, the fact is that the respondent sat mutely in the back of the room until the conference was concluded, never speaking to the judge, who in any event was not expected to have any continuing connection with the matter, until the meeting was over. After the court recessed, the parties and their attorneys were already engaged in a heated corridor discussion when the respondent, having approached the group to offer some information on the zoning question and having received a rejoinder that appeared to challenge his credibility, proudly responded "I am a Judge of the City Court. I don't lie. When I state a fact, it is a fact".

Now, it would seem that altogether too much has been made of the fact that the respondent introduced himself as "Judge" Shilling when he had the telephone conversations. It is clear that, if anything, the relevant association that was stressed was, in the words of a communicant called by the Commission, "the Judge Shilling who was involved with the AHS". Titular identification of judges, even after they no longer hold judicial office, is the accepted practice. Former judges are usually so addressed when they appear in court as lawyers. It would be unreal then, to expect that judges (or for that matter, clergymen, physicians, professors or doctors of philosophy), just because they may find themselves addressing people with whom they have a difference of opinion in private matters, should be required to move about with a cloak of anonymity. The important thing, of course, is that a judge should conduct himself, off or on the bench, in a manner respectful of the title he or she bears.

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[2] It is interesting to note, for whatever it is worth in these proceedings that ultimately the license was granted and the summonses against the employee in the main were dismissed.

Now, we must not lose sight of the fact that, no matter how we subdivide it into its details, overall this case involves only one situation, the controversy between the Humane Society and the ASPCA, in which, the respondent, for idealistic and humane reasons, foolishly permitted himself to be swallowed up. Withal, he insists that he never intended to exert the influence of his office. This must be accepted for, whatever may be said about his judgment or the care with which he expressed himself in this instance, one thing that appears established, and confirmed, in his principled veracity.

Corroborative is the fact that, though some may have formed the impression that he intended to exert influence on behalf of the Humane Society, there is nothing at all to indicate that he ever tried to do so. The threat, indeed, may have been largely within the minds of the witnesses as a reaction to the vigor and vehemence of his repeated requests on behalf of the Society. While the Judge should have been mindful that there could be such reaction and controlled his conduct accordingly, in the circumstances here I cannot accept judicial action, which, repudiating the Commission's determination, insists on a result that not even a post-Watergate public image syndrome would justify.[3]

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[3] Since none of the three disciplinary cases cited by the per curiam (*Matter of Lonscheim*, 50 NY2d 569; *Matter of Kuehnel*, 49 NY2d 465; *Matter of Steinberg*, 51 NY2d 74) would justify the drastic disposition in the present case, I append the following comments on each:

In *Lonscheim*, the respondent had intervened in two nonjudicial matters, one on behalf of a close personal friend who had encountered difficulties with various New York City administrative agencies from whom he was seeking to obtain a lease to a car service base station, the other by communicating with a deputy counsel of the City Taxi and Limousine Commission to urge the removal of "various impediments * * * thwarting ap-

[Footnote continued on following page]

The sanction voted by the Commission on Judicial Conduct should be accepted.

* * * * *

Determined sanction rejected, without costs, the sanction of removal imposed and Norman H. Shilling removed from his office of Judge of the Civil Court of the City of New York, effective at midnight December 31, 1980, and, during the period between the date of service upon him of a copy of the order to be entered herein and December 31, 1980, he is suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service. Opinion Per Curiam. All concur except Fuchsberg, J., who dissents and votes to accept the determined sanction in an opinion.

Decided November 25, 1980

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proval" of a "lucrative contract". The determination of the Commission was that the judge be censured on each. This Court *rejected* the determined sanction as excessive on the one charge and, though it found that "petitioner was aware that his judicial position would affect the subsequent conduct of the counsel" and nevertheless "placed the prestige of his office behind the request", it *reduced* the sanction on the second to admonishment.

In *Kuehnel*, where the Commission's recommendation of removal was accepted by the Court, the respondent, *inter alia*, after detaining four youths without cause, engaged in "two frenzied displays of overt physical violence towards young boys", engaged in "repeated outbursts * * * of virulent racism", displayed "at the very least a gross lack of candor" before the officer who heard the charges. There can be no comparison between this case and that of Judge Shilling.

In *Steinberg*, where the Commission's recommendation of removal was accepted by the Court, the respondent was found, *inter alia*, for years to have been using his chambers to conduct a loan brokerage business, had utilized a judicial employee to collect his loan payments and had deliberately falsified his income tax returns. Again, there can be no comparison between this case and that of Judge Shilling.

Appendix—Motion

STATE OF NEW YORK

COURT OF APPEALS

SCJC Mo. No. 1327

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of December A.D. 1980.

Present, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

In the Matter of NORMAN H. SHILLING, a Judge of the Civil Court of the City of New York, Kings County,
Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

A motion for reargument and for a stay in the above cause having heretofore been made upon the part of the petitioner herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for reargument, considered as a motion for reconsideration, be and the same hereby is granted. And it is

ORDERED, on reconsideration, the original decision of this Court be and the same hereby is adhered to. A question under the Constitution of the United States, viz: whether petitioner was denied due process of law by this Court's decision, was raised and necessarily passed on by this Court. And it is

ORDERED, that the said motion for a stay be and the same hereby is denied without prejudice to an application under Title 28 § 2108 of the U.S. Code to an individual Judge of this Court.

JOSEPH W. BELLACOSA

.....

JOSEPH W. BELLACOSA
Clerk of the Court

STATE OF NEW YORK

COURT OF APPEALS

In the Matter of NORMAN H. SHILLING, a Judge of the Civil Court of the City of New York, Kings County,
Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

Order Denying Application for a Stay

An order of the Court of Appeals of the State of New York having been made and entered November 25, 1980 removing petitioner from his judicial office effective December 31, 1980, and petitioner having by order to show cause dated December 17, 1980 moved for reargument and a stay pending decision of that motion, and this Court having considered said motion as one for reconsideration and on consideration of the due process argument advanced by petitioner having adhered to its original determination and denied petitioner's application for a stay without prejudice to an application by petitioner to an individual judge of this Court for a stay pursuant to Section 2101 of Title 28 of the United States Code, and petitioner having applied to me as an Associate Judge of the Court for a stay pursuant to the foregoing section of the United States Code, it is

ORDERED that a stay of execution and enforcement of the order of this Court dated November 25, 1980 be and it is hereby denied.

Dated at Albany, New York
December 17, 1980

BERNARD S. MEYER

.....

BERNARD S. MEYER
Associate Judge

SUPREME COURT OF THE UNITED STATES

No. A-549

NORMAN H. SHILLING,

Appellant

—v.—

STATE COMMISSION ON JUDICIAL CONDUCT

Order

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the execution and enforcement of the judgment of the Court of Appeals of New York, No. 488, entered November 25, 1980, be, and the same is hereby, stayed pending the timely docketing and disposition of the appeal by this Court.

THURGOOD MARSHALL

.....

Associate Justice of the Supreme
Court of the United States

A true copy MICHAEL RODAK, JR.
Clerk of the Supreme Court of the United States

Test:

By: ALEXANDER S. STEVAS
Chief Deputy

Dated this 29th
day of December, 1980

Notice of Appeal

STATE OF NEW YORK

COURT OF APPEALS

In the Matter of NORMAN H. SHILLING, a Judge of the Civil Court of the City of New York, Kings County,
Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

NOTICE is hereby given, that the petitioner herein, Norman H. Shilling, appeals to the Supreme Court of the United States, from the decision of the Court of Appeals dated November 25, 1980, and "adhered to" by the Court of Appeals by decision dated December 17, 1980 on petitioner's motion for reargument.

Appeal to the Supreme Court of the United States is taken pursuant to 28 U.S.C. § 1257(2).

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State Commission on
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801 Second Avenue
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[Stamped]
Received
Dec. 23 1980
Court of Appeals

United States Constitution

FOURTEENTH AMENDMENT

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Constitution

Article VI, § 22

[Commission on judicial conduct; membership; organization and procedure; review by court of appeals; discipline of judges]

a. There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for rental [read "mental"] or physical disability preventing the proper performance of his judicial duties. The commission shall transmit any such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

b. (1) The commission on judicial conduct shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of

the unified court system, and one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.

(2) The persons first appointed by the governor shall have respectively one, two, three, and four-year terms as he shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three, and four-year terms as he shall designate. The person first appointed by the temporary president of the senate shall have a one-year term. The person first appointed by the minority leader of the senate shall have a two-year-term. The person first appointed by the speaker of the assembly shall have a four-year term. The person first appointed by the minority leader of the assembly shall have a three-year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him for such appointment. Membership shall also terminate if a member attains a position which would have rendered him ineligible for appointment at the time of his appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

c. The organization and procedure of the commission on judicial conduct shall be as provided by law. The commission on judicial conduct may establish its own rules and procedures not inconsistent with law. Unless the legislature shall provide otherwise, the commission shall

be empowered to designate one of its members or any other person as a referee to hear and report concerning any matter before the commission.

d. In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

e. The court of appeals may suspend a judge or justice from exercising the powers of his office while there is pending a determination by the commisison on judicial conduct for his removal or retirement, or while he is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

f. Upon the recommendation of the commission on judicial conduct or on its own motion, the court of appeals may suspend a judge or justice from office when he is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be

removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

g. A judge or justice who is suspended from office by the court of appeal shall receive his judicial salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that he shall be paid his salary for such period of suspension.

h. A judge or justice retired by the court of appeals shall be considered to have retired voluntarily. A judge or justice removed by the court of appeals shall be ineligible to hold other judicial office.

i. Notwithstanding any other provision of this section, the legislature may provide by law for review of determinations of the commission on judicial conduct with respect to justices of town and village courts by an appellate division of the supreme court. In such event, all references in this section to the court of appeals and the chief judge thereof shall be deemed references to an applate division and the presiding justice thereof, respectively.

j. If a court on the judiciary shall have been convened before the effective date of this section and the proceeding shall not be concluded by that date, the court on the judiciary shall have continuing jurisdiction beyond the effective date of this section to conclude the proceeding. All matters pending before the former commission on judicial conduct on the effective date of this section shall be disposed of in such manner as shall be provided by law.

Adopted Nov. 8, 1977.

Office-Supreme Court, U.S.
FILED
APR 20 1981
ALEXANDER L. STEVAS
CLERK

No. 80-1611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN H. SHILLING,

Appellant,

v.

STATE COMMISSION ON JUDICIAL CONDUCT,

Appellee.

ON APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

MOTION TO DISMISS APPEAL OR AFFIRM ORDER APPEALED FROM

GERALD STERN
Counsel to the Appellee
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(212) 949-8860

Questions Presented

1. Whether a substantial federal question meriting review by this Court is presented by a provision of the New York State Constitution, empowering the New York Court of Appeals, on review of a determination of the State Commission on Judicial Conduct, to impose upon a judge a more severe disciplinary sanction than the one rendered by the Commission, when such review is commenced at the request of the judge.

2. Whether such a provision is unconstitutionally "vindictive" on its face or in its application to appellant.

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No. 80-1611

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN H. SHILLING,

Appellant,

v.

STATE COMMISSION ON JUDICIAL CONDUCT,

Appellee.

ON APPEAL FROM THE STATE OF NEW YORK
COURT OF APPEALS

MOTION TO DISMISS APPEAL OR AFFIRM ORDER APPEALED FROM

Opinion Below

The opinion of the Court of Appeals, dated November 25, 1980 (A 1a-13a*), upon which the order appealed from is based, is officially reported at 51 N.Y.2d 397 (1980).

* References to documents reproduced in the Appendix to appellant's jurisdictional statement are indicated as "A", with appropriate page numbers inserted.

Jurisdiction

After the service upon him of the order of removal of the Court of Appeals, appellant, raising for the first time the federal constitutional claims advanced herein, moved in the Court of Appeals for reargument of its decision or, in the alternative, for a stay of the removal order pending further application to this Court. By order of December 17, 1980, the Court of Appeals, treating the motion as one for reconsideration, granted the motion, and on reconsideration, adhered to its original decision of November 25, 1980 (A 14a). A subsequent application by appellant to a single judge of the Court of Appeals, seeking a stay of the order of November 25, was denied the same day (A 15a).

Appellant thereupon filed a notice of appeal to this Court and, in papers dated December 22, 1980, applied to this Court for a stay of his removal pending determination of the appeal. By order dated December 29, 1980, Justice Marshall stayed the execution and enforcement of the November 25 order "pending the timely docketing and disposition of the appeal by this Court" (A 16a).

The appellee, State Commission on Judicial Conduct ("Commission"), makes this motion, pursuant to Rule 16 of this Court, to dismiss the appeal taken by Norman H. Shilling ("appellant") from the order of the State of New York Court of Appeals, entered on November 25, 1980, removing appellant from office effective December 31, 1980, on the grounds that there is no substantial federal question meriting review by this Court; or, in the alternative, to affirm that order.

Constitutional and Statutory Provisions Involved

1. New York State Constitution, Article 6, § 22(a) states:

> There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge be admonished, censured or removed from office for cause, including but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties. The commission shall transmit any such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

2. New York State Constitution, Article 6, § 22(d) states:

> In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than

the one determined by the commission, or impose no sanction.

3. New York State Judiciary Law § 44(9) states:

> In its review of a determination of the commission, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. After such review, the court may accept or reject the determined sanction; impose a different sanction including admonition, censure, removal or retirement for the reasons set forth in subdivision one of this section; or impose no sanction.

Statement

The Respective Roles Of The State Commission On Judicial Conduct And The Court Of Appeals

The New York State Commission on Judicial Conduct receives complaints "with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system . . ." (N.Y. Const. Art. 6, § 22[a]). The Commission may dismiss a complaint if it lacks merit, or it may conduct an investigation (Judiciary Law § 44[1]). Following an investigation, the Commission may decide to dismiss the complaint or file charges in a "formal written complaint" (Judiciary Law § 44[4]). A due process hearing is then held before a referee designated by the Commission (Judiciary Law § 43[2]). Ultimately, the Commission may dismiss the complaint or determine that the judge be admonished, censured or removed from office. The determination is subject to review by the Court of Appeals upon request of the judge within 30 days of receipt of the determination (Judiciary Law § 44[7]).

As set forth in the applicable Rules of the Court of Appeals ("Court Rules"), 22 NYCRR Part 530, a proceeding for review of a Commission determination is commenced by the filing of a "request for review," within the 30-day statutory period (Court Rule 530.1). Separate Court Rules regulate the time for filing and content of a "record for review" and briefs (Court Rules 530.2-530.6).

The Court of Appeals reviews the record of the proceedings before the Commission and "may accept or reject" the determined sanction. If the Court rejects the Commission's proposed sanction, the Court may impose a different sanction—any of those prescribed by law—or no sanction (Judiciary Law § 44[9]). The power to impose "a less or more severe sanction" is provided by the State Constitution (Article 6, § 22[d]).

The Court of Appeals has held that its power of review of Commission determinations is:

> unusually broad, encompassing as it does authority not only to "review the Commission's findings of fact and conclusions of law," but also to "impose a less or more severe sanction . . . than the one determined by the Commission, or [to] impose no sanction."
>
> *Matter of Spector,* 47 N.Y.2d 462, 465-66 (1979)

Thus, the issues before the Court of Appeals in every case include, "the correctness of the Commission's findings of fact and conclusions of law as well as the appropriateness of the Commission's determination." *Ibid.*

The Proceedings Before The Commission In Matter Of Norman H. Shilling

On June 4, 1979, following an investigation, the Commission served upon appellant a formal written complaint, charging that he had improperly interfered in the course

of a proceeding before another judge and lent the prestige of his office to advance the interests of a third party, Associated Humane Societies of New Jersey ("AHS"), a non-profit corporation of which he served as a trustee.

Specifically, it was alleged that between December 1977 and December 1978, appellant communicated with officials of the American Society for the Prevention of Cruelty to Animals ("ASPCA") and the New York City Department of Health ("City"), demanding that three summonses received by an AHS employee—accusing the employee of health code violations and operating an animal shelter without a license—be withdrawn, and that an operating permit be issued to AHS. His requests allegedly had been communicated in forceful and, sometimes, abusive, hostile terms. It was further alleged that, upon the calendar call of the case, appellant sat within view of the presiding judge, spoke to the judge in the courtroom after the case was adjourned and commented about the merits of the case, and, thereafter, accosted ASPCA and City officials in a public corridor outside the courtroom, identified himself as a judge, berated them in a visibly angry and profane manner, and threatened to use his political influence.

Following its receipt of appellant's answer denying most the factual allegations, the Commission referred the case to a referee to hear and report. A hearing was held on October 29, 30, 31 and November 1, 1979, at which appellant and numerous other witnesses testified. On January 24, 1980, the referee issued his report. The case was briefed and argued before the Commission, which determined that the judge should be censured.

After setting forth its findings of fact and conclusions of law, the Commission stated, *inter alia:*

> It was improper for respondent (i) to intercede in the *Esteves* case by attempting to persuade two officials of the A.S.P.C.A. with law enforcement authority to

withdraw the summonses which commenced the proceeding and to have identified himself as a judge while so doing, (ii) to interfere on behalf of the A.H.S. with officials of the New York City Department of Health as to their decision not to issue a permit to A.H.S., to have identified himself as a judge while so doing, and to have addressed the City officials in a hostile, profane and loud manner, (iii) to speak in a loud voice in the courthouse corridor with the attorney for the A.S.P.C.A. and to make reference to political influence, and (iv) to interfere in the court's consideration of the *Esteves* case by speaking to the presiding judge on behalf of the defendants. Judge Nardelli appropriately did not respond or allow himself to be engaged in conversation with respondent on this matter.

Respondent has exhibited a disturbing disregard of the ethical obligations required of all judges. He has used the prestige of his office to assert special influence on behalf of a third party and brought disrepute to the judiciary by his vulgar and abrasive public manner.

Respondent has shown little or no understanding of the standards of demeanor incumbent upon all judges as expressed in the Rules Governing Judicial Conduct. A judge's obligation to adhere to those standards is not limited to the courtroom. *Matter of Kuehnel* v. *State Commission on Judicial Conduct,* —— N.Y.2d —— (Mar. 18, 1980).

The Commission finds the blatant impropriety respondent has evinced to be seriously compounded by his refusal in this record to acknowledge that his actions even appeared improper. Respect for the judiciary has been diminished both by respondent's conduct and the appearance of impropriety thereby engendered.

(Appen. 5A-6A*)

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* References to documents reproduced in the Appendix to this motion are indicated as "Appen." with appropriate pages numbers inserted.

The Proceedings Before The Court Of Appeals And The Decision Of That Court

On April 17, 1980, appellant filed a request for review of the Commission's determination. After several extensions of time to file a brief and record were granted, appellant's brief was received on July 18, 1980. On page 1 of his brief, appellant expressed his recognition that the Court of Appeals could take any action it deemed appropriate, including removing appellant from office.

His brief stated in part:

> With full realization that under the provisions of Article "6", Section "22" of the New York State Constitution, this Court "may impose" a "more severe" sanction than the one determined by the Commission; Petitioner nevertheless seeks a reversal of the finding of the Commission on Judicial Conduct which found that he violated Sections 33.1, 33.2(a), 33.2(c), 33.5(a), and 33.5(c)(1) of the Rules governing Judicial Conduct and Canons 1, 2, 5A and 5C of the Code of Judicial Conduct, and determined that he be censured.

The Court of Appeals heard oral argument on October 8, 1980. In an opinion and orders (Appen. 7A-10A) dated November 25, 1980, the Court rendered its decision, rejecting the Commission's determination, and, pursuant to its power under New York State Constitution Article 6, § 22(d), removing appellant from office.

The Court held that:

> A Judge whose conduct off the bench demonstrates a blatant lack not only of judgment but also of judicial temperament, and complete disregard of the appearances of impropriety inherent in his conduct, should be removed from office, notwithstanding that his reputation for honesty, integrity and judicial demeanor in the legal community has been excellent.
>
> 51 N.Y.2d at 399 (A 1a)

The Court found the evidence of appellant's misconduct to be "both cumulative and reliable" (A 5a), and also found "neither reason to disturb the Commission's findings and conclusions concerning that misconduct nor any basis for holding that there was any infirmity in the procedure followed." *Id.* at 403 (A 5a).

With respect to the sanction, the Court stated as follows:

> We do, however, reject the Commission's determined sanction. We recognize that the power given us by subdivision 9 of Section 44 of the Judiciary Law to do so, is not lightly to be exercised and that the ultimate sanction of removal is not normally to be imposed for poor judgment, even extremely poor judgment (*Matter of Steinberg, supra,* at p. 81). The situation with which we deal here is clearly more egregious than that involved in *Matter of Lonschein* (50 N.Y.2d 569), where the judge sought special consideration for a license applicant but never asserted his judicial office and did no more than request expedition of the application. Here petitioner, having identified himself as a judge, nevertheless thought it not improper to request the ASPCA, the complaining and prosecuting agency, to cause dismissal of pending charges. He also asked for preferential treatment for AHS, clearly contrary to the spirit and purpose of the regulatory provisions being enforced, by requesting that he be given advance notice of when reinspection might take place. Likewise, he felt it not improper to address a remark to the Judge before whom the matter was eventually called and which impugned the motives of ASPCA and the Department of Health in seeking to enforce those regulatory provisions. That it may have been improbable that the same judge would sit when the matter was again called before the court appears, like petitioner's suggestion that he

lacks political clout, to be an afterthought which may temper but does not excuse the initial transgression. Also not improper in petitioner's mind was the threat, made on two separate occasions to Dr. Beck and during the courthouse corridor confrontation, to use political influence to obtain the ends he sought, made in intemperate tones and with the use of vulgarity. That he could be wholly unmindful of the impression that would be made upon others present in that corridor by the spectacle of a person identifying himself as a judge and speaking in loud and threatening tones of his friends in high places strongly suggests a lack of judicial temperament. Not without significance in that respect is the private admonishment of petitioner by the former State Commission on Judicial Conduct in March 1977 for having used profane, vulgar and inappropriate language in open court on several occasions in November 1976.

Compounding those four separate instances of impropriety, as the commission noted, is petitioner's continued insistence that his actions involved neither impropriety nor the appearance of impropriety. Judicial office, concerned as it is with concepts of reasonable care, arbitrariness, capriciousness, substantiality of evidence, excessiveness of discipline, involves a large measure of discretion. Public acceptance of the judicial product, however exemplary on a substantive level, cannot survive the acceptance of such invective and pressure politics as petitioner's conduct suggests. As in *Matter of Steinberg* (51 N.Y. 2d 74, 84, *supra*), we conclude "that petitioner's complete insensitivity to the special ethical obligations of Judges [renders] him unfit for judicial service."

Id. at 403-04 (A 5a-7a)

The Court confirmed the Commission's findings and conclusions except as to sanction and directed that appellant be removed from office, effective December 31, 1980, and, in the interim, suspended him with pay "except to the extent necessary to complete matters begun but not completed by him" on the date of service of the order of removal (A 7a).

Summary of Argument

There is no basis in law to support appellant's contention that it is unconstitutional for the highest court of a State to render a more severe disciplinary sanction than one "determined" by the State's judicial conduct commission when the review was initiated by the judge facing discipline. Nor is there any basis to conclude that the New York State Court of Appeals in fact punished appellant for seeking a review by that court.

1. A court may not punish a defendant for having successfully challenged some action by that court. Thus, in the absence of any "reason or explanation," increased punishment by the same court will be deemed to be "vindictive" and, hence, a violation of due process of law. *North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969).

2. An increase in punishment on resentencing by another court does not raise due process problems since it is not inherently vindictive, and there is no basis to assume that the second court has any reason to be vindictive. *Colten* v. *Kentucky*, 407 U.S. 104 (1972); *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973).

3. Thus, no vindictiveness will be found to exist on the face of a procedure when a reasonable explanation is set forth for the increased punishment, or when the resentencing court is not the court that was the subject of the

successful challenge, since there is nothing inherently vindictive about the procedure.

4. Subjective fear that the exercise of a right would lead to greater punishment is insufficient to vitiate an otherwise proper criminal procedure. That such fear had a "chilling" effect or might deter the exercise of a right is not a violation of due process of law, in the absence of vindictiveness or retaliation for the exercise of such right. *Corbitt* v. *New Jersey,* 439 U.S. 212 (1978); *Chaffin* v. *Stynchcombe, supra.*

5. It is not unconstitutional to increase a criminal sentence on an appeal initiated by the defendant; several states provide for such procedures. Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review,* 69 J. Crim. L. & Criminology 19, 20 n.8 (1978).

6. In any event, a judge facing discipline does not have the same due process rights as a defendant in a criminal proceeding, and, thus, even if it were unconstitutional to increase a criminal sentence on an appeal initiated by a defendant, such right would not be transferred to a judge who initiates a review of a Commission determination and is removed from office. Due process of law applies to judicial disciplinary proceedings, but not the "full panoply" of due process rights. *Mildner* v. *Gulotta,* 405 F.Supp. 182, 210 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901 (1976); *Withrow* v. *Larkin,* 421 U.S. 35 (1975).

7. There was no actual vindictiveness in the case at bar. The opinion of the Court of Appeals was comprehensive, and fully explained the action of the Court. A reference to appellant's intransigent attitude about his misconduct was perfectly proper, in keeping with the standard test in New York whether the misconduct demonstrates the judge's unfitness for judicial office, and was not evidence that he had been punished for seeking review.

ARGUMENT

POINT I

A State Constitutional provision allowing an increased disciplinary sanction by the Court of Appeals upon a review initiated by the Judge facing discipline is not "vindictive" on its face and, hence, does not violate due process of law.

a) Appellant's misplaced reliance upon the "vindictiveness" decisions

Appellant cites the well established law that it is unconstitutional for a court to retaliate against a defendant for successfully challenging an earlier conviction. Thus, after a conviction is set aside, if the same trial court imposes an unexplained increase in the sentence (without "reason or justification") following a retrial, the harsher punishment will be viewed as inherently retaliatory. *North Carolina* v. *Pearce,* 395 U.S. 711, 726 (1969).

The *Pearce* analogy was rejected by this Court in *Colten* v. *Kentucky,* 407 U.S. 104 (1972) in which an increased sentence had been imposed after a second trial in another court. The first trial had resulted in a conviction, and the defendant exercised his right to a trial *de novo.* Because the second sentence had been imposed by a different judge, there was "little possibility that an increased sentence on trial *de novo* could have been motivated by personal vindictiveness on the part of the sentencing judge." *Blackledge* v. *Perry,* 417 U.S. 21, 26 (1974). The Court in *Colten* found that there was no "inherent" vindictiveness in such a system, and cited the "obvious" factor that there was no sound logic or reason for the second court to be vindictive:

> . . . the court which conducted Colten's trial and imposed the final sentence was not the court with whose

> work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had already done correctly.
>
> *Id.* at 116-17

Similar reasoning by this Court led to the conclusion that vindictiveness was not shown when a different jury sentenced the defendant following reversal of an earlier conviction. *Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973). As this Court subsequently observed, "the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review." *Blackledge* v. *Perry,* 417 U.S. at 27. Hence "the danger of vindictiveness under the circumstances of the case was '*de minimus.*' " *Ibid,* citing *Chaffin* v. *Stynchcombe,* 412 U.S. at 26. This Court has made it clear that it is not every "possibility" of vindictiveness on resentencing that will raise due process problems. A possibility of vindictiveness becomes a due process problem only when it is "found to inhere in the . . . system" under consideration. *Ibid.*

In 1974, this Court interpreted its decisions in *Pearce, Colten* and *Chaffin* by observing that only "a realistic likelihood of 'vindictiveness' " would offend the clause, and not every instance of increased punishment. *Blackledge* v. *Perry,* 417 U.S. at 27.

And in *Bordenkircher* v. *Hayes,* 434 U.S. 357 (1978), this Court upheld the conduct of a prosecutor who offered the defendant the choice of pleading guilty to an existing charge or facing a new indictment based on a habitual offender statute carrying a much harsher sentence upon conviction. The Court reasoned that the defendant had full notice of alternatives, the second charge was fully justified

by evidence in the prosecution's possession at the time of the original indictment, and the institution of plea bargaining would be seriously undermined if prosecutors were penalized for seeking to induce guilty pleas. The element of free choice in plea bargaining was a factor in the Court's decision. The Court stated: "[T]here is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." *Id.* at 363.

Thus, among the factors which might lead to a conclusion that there had been vindictiveness in an increased sentence are (1) the same court imposed greater punishment following a successful challenge to that court's action; (2) the absence of any "reason or explanation" for the increased sentence; (3) the inherently vindictive nature of the process (i.e., the probability based on human experience and sound logic that retaliation for the successful challenge entered into the decision to impose more punishment).

In an attempt to come within the *Pearce-Blackledge* vindictiveness rationale, appellant offers a strained theory of vindictiveness. First, he raises the possibility of vindictiveness by an unsupported assumption that the Court of Appeals frowns on meritless, time-consuming appeals. He states (App. br. 12):

> The possibility that the Court of Appeals will impose a harsher sanction than did the Commission because of its vexation with what it perceives to be a meritless, time-consuming appeal is a possibility built into the structure of § 22, and one which cannot be ignored.

Having expressed this "possibility," he then goes on to assume its truth and builds his constitutional argument on this "possibility" as though its logic is self-evident.

The theory is then repeated to suggest that no fair-minded person could possibly suggest that the Court of

Appeals does not have an interest in maintaining a manageable caseload. Appellant states (App. br. 13):

> Surely, one could not say that the New York Court of Appeals lacks institutional interests in discouraging appeals that burden its already crowded docket—especially appeals it perceives as meritless, brought by judges (1) who ought to know better and (2) who embarrass other judges by insisting on pressing meritless points concerning their improper conduct.

Thus, in developing a theory that the Court of Appeals retaliated against appellant for exercising his right to seek review, appellant speculates that he was penalized because (1) judges "ought to know better" than to bring "meritless" appeals and (2) it is embarrassing to other judges when meritless points are urged. His speculation is not grounded on any rational experience or compelling logic. In short, it is a desperate attempt to come within the purview of the *Pearce* and *Blackledge* rationale, and, on existing law, must fail.

Appellant's theory bears no resemblance to the facts in *Pearce* and *Blackledge, supra,* which led this Court to assume that the defendants in those cases were being punished *for* having exercised their rights. That is entirely different from the result in this case where appellant was removed as a consequence of the review process (initiated by appellant).*

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* Appellant's repeated use of the word "appeal" to describe the review process is inaccurate. The Court is part of the process and has been given broad power, albeit when a judge facing discipline requests such a review. Since April 1, 1978, the Court of Appeals has reviewed ten cases: *Matter of Spector,* 47 N.Y.2d 462 (1979) (admonition accepted); *Matter of Dixon,* 47 N.Y.2d 523 (1979) (censure rejected, admonition imposed); *Matter of Bulger,* 48 N.Y.2d 32 (1979) (censure accepted); *Matter of Dier,* 48 N.Y. 2d 874 (1979) (censure accepted); *Matter of Kuehnel,* 49 N.Y.2d

(footnote continued on following page)

b) A procedure which deters or "chills" the exercise of a right, or places a "burden" on such a right, does not necessarily violate due process of law

Appellant seems to suggest that any procedure that "chills" the exercise of a right (such as the right to obtain a review of a Commission determination) constitutes a violation of due process if there is an alternative procedure that could have been implemented. He argues that since New York could have developed a review system which created no "chills," the review procedure is unconstitutional (App. br. 13-14).*

This view of the law, quite simply, is wrong. This Court does not substitute its judgment for that of a state legislature or a high state court. Any review procedure would have a theoretical alternative that would suit certain persons at certain times. "Chills" are subjective. The possibility of a "chill" will not form a basis to strike down a state constitutional procedure.

(footnote continued from preceding page)

465 (1980) (removal accepted); *Matter of Kane*, 50 N.Y.2d 360 (1980) (removal accepted); *Matter of Lonschein*, 50 N.Y.2d 569 (1980) (censure rejected, admonition imposed); *Matter of Steinberg*, 51 N.Y.2d 74 (1980) (removal accepted); *Matter of Shilling*, 51 N.Y.2d 397 (1980) (censure rejected, removal imposed); *Matter of Rogers*, 51 N.Y.2d 224 (1980) (removal rejected, censure imposed).

There is no basis from this record to support the assumptions made by appellant as to the Court's motives. Indeed, the Court has demonstrated that it has every intention to take its review responsibility seriously and has done so.

* Appellant's argument, entirely unsupported in law, is:

> "With respect to the appellate structure under consideration here, however, it simply is neither inevitable nor even necessary that the Court of Appeals should be able to impose an enhanced sanction only upon those judges availing themselves of the right to obtain review. Because New York could readily have designed its appellate review structure otherwise . . . , the substantial chilling effect . . . is unnecessary and, therefore, impermissible."

Appellant then goes further by stating (App. br. 14-19) that the sole purpose of the New York constitutional provision is to deter, and the provision for an increased sanction is "entirely unnecessary to the achievement of any legitimate purpose" (App. br. 19). This argument is absurd on its face. Obviously, the procedure achieves a legitimate purpose. It provides for full review, with a full range of action available to the Court of Appeals, and the Court's authority to act is initiated on the request of the judge facing discipline. Appellant is simply second guessing the New York State Legislature which chose the means to have the New York State Court of Appeals participate in the judicial disciplinary process. It is New York State policy to make the Court of Appeals an integral part of the process, when a judge facing discipline requests review. The Court has been given authority in such cases to make findings of fact and conclusions of law, and to exercise the full range of actions under the Constitution. The law permits the Court to increase, decrease or accept a Commission's proposed sanction of a judge in a case in which it has completed a comprehensive review. If, following such a review, the Court of Appeals disagrees with the sanction determined by the Commission, the Court may substitute its judgment and render any sanction prescribed by law. That the Court has such broad power of review only when a judge wishes to challenge a Commission determination does not render the law improper or without purpose. One may reasonably argue in favor of or in opposition to the New York policy, but one may not reasonably argue that the only purpose of the law is to punish those who exercise their rights. It need hardly be emphasized that in dealing with the conduct of judges, the highest court of a state has more than a passing interest in the integrity, reputation and fitness of judges.

Appellant's "deterrence" arguments are without substance. "Chills" and "burdens" do not raise a constitutional problem in the absence of vindictiveness, "despite whatever incidental deterrent effect they [higher sentences] might have on the right to appeal." *Chaffin* v. *Stynchcombe,* 412 U.S. at 29.*

The due process violations of *Pearce* and *Blackledge* "lay not in the possibility that a defendant might be deterred from the exercise of a legal right . . . but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction." *Bordenkircher* v. *Hayes,* 434 U.S. at 363.

To strike down a state constitutional procedure on the flimsy rationale offered by appellant would be unprecedented. It would create an issue of constitutional proportions whenever the Court of Appeals did not do what a judge facing discipline requested the Court to do. Even the acceptance of a Commission determination by the Court of Appeals could raise the issue of "vindictiveness." A judge who faced censure or removal could argue that the Court accepted the respective determination as a message to judges not to seek review. The point is that mere speculation that a decision was vindictive is simply not

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* Appellant's reliance on *United States* v. *Jackson,* 390 U.S. 570 (1968) is misplaced. As the Court said in *Chaffin* v. *Stynchcombe,* 412 U.S. at 30, "*Jackson* did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Jackson* was also explained by this Court in *Corbitt* v. *New Jersey,* 439 U.S. 212 (1978): "The cases in this Court since *Jackson* have already established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." 439 U.S. at 218. Thus, the Court upheld a heavier sentence after trial than the defendant would have received if he agreed to a plea in lieu of trial, and "no element of retaliation or vindictiveness" was discerned. *Id.* at 223.

what successful constitutional attacks have been based upon.

The New York Court of Appeals decided that the record before it amply demonstrated that appellant should not be a judge. That decision followed full due process in every respect. Appellant disagrees with the Court of Appeals. Presumably, he regrets having sought review. He may have made the wrong choice. He may have believed that the Court of Appeals would exonerate him, but he knew that he might be removed (App. Court of Appeals br. 1). Now he says that the law which he sought to take advantage of is unfair because it resulted in his paying a "price" for his choice. Even if in common parlance he did pay a "price" for his choice, that is not the test of constitutionality advanced by this Court's decisions cited in appellant's brief. His argument simply lacks the firm constitutional underpinnings which would strike down a state constitutional and statutory scheme for the disciplining of judges.*

c) An increased criminal sentence by an appellate court following an appeal by the defendant is not unconstitutional

The necessary implication in appellant's argument is that under similar circumstances, criminal law procedures would be struck down.

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* Appellant includes in his brief a discussion of disciplinary law procedures in the country (App. br. 16-18, n.16). In most states the high court makes the ultimate decision. Generally, misconduct commissions make recommendations which may be accepted or rejected. If a recommendation is rejected, the Court may impose a lesser or greater sanction, or no sanction. The Courts in other states in fact have removed judges following recommendations of lesser sanctions by the respective commissions. *Matter of Jordan,* 622 P.2d 297 (Sup.Ct. Oregon 1981); *Matter of Diener,* 268 Md. 659, 304 A.2d 587 (1973).

Appellant relies on the well established principle of law that rights of appeal "must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager,* 384 U.S. 305 (1966). He cites as an example a decision of this Court holding that when the right of appeal has been granted it may not be infringed by the denial of the right to counsel (*Douglas* v. *California,* 372 U.S. 353 [1963]).

These decisions have no bearing on the argument being made by appellant. His right to seek review was unimpeded. Indeed, he willingly and openly accepted the possibility that he might be removed from office after the Court of Appeals reviewed the record, read briefs and heard oral argument (App. Court of Appeals br. 1). When he wrote to the Court seeking review, the "determination" of the Commission became tentative. At that point only the Court could render a sanction, although it could have accepted the Commission's determination.

Several states permit increased criminal sentences on appeal by defendants. Dunsky, *The Constitutionality of Increasing Sentences on Appellate Review,* 69 J.Crim. L. & Criminology 19, 20 n.8 (1978). The constitutionality of this procedure has been upheld. See *Robinson* v. *Warden,* 455 F.2d 1272 (4th Cir. 1972); *Walsh* v. *Picard,* 446 F.2d 1209 (1st Cir. 1971); *Hicks* v. *Commonwealth,* 345 Mass. 89, 185 N.E.2d 739 (1962), *cert. denied,* 374 U.S. 839 (1963); *Kohlfuss* v. *Warden of Connecticut State Prison,* 149 Conn. 692, 183 A.2d 626, *cert. denied,* 371 U.S. 928 (1962). This Court has not struck down such a procedure. (Even if it does so, it would not necessarily affect disciplinary proceedings.)

POINT II

Assuming, *arguendo,* that a high state court could not properly increase a criminal sentence on an appeal right given exclusively to the defendant, such a principle of law would be inapplicable to the Court of Appeals decision in the case at bar.

A disciplinary proceeding is not a criminal proceeding. Although due process of law applies to judicial disciplinary proceedings, the due process rights of a criminal defendant are not transferred *en masse* to a judge, teacher or other public employee facing disciplinary charges. See, Cohn, *The limited due process rights of judges in disciplinary proceedings,* 63 Judicature 232 (Nov. 1979). The degree of due process applicable to a particular proceeding depends on the nature of that proceeding and the interests of both the government and the individual. *Goldberg* v. *Kelly,* 397 U.S. 254, 263 (1969). The "full panoply of due process protections" is reserved for an individual faced with criminal prosecution and the attendant risk of deprivation of liberty by incarceration. *Mildner* v. *Gulotta,* 405 F.Supp. 182, 210 (E.D.N.Y. 1975), *aff'd,* 425 U.S. 901 (1976). The possible loss of public employment is not analogous to the loss of liberty. *Arnett* v. *Kennedy,* 416 U.S. 134, 157 (1974). Thus, the public employee is not entitled to the same degree of due process protection as a defendant in a criminal proceeding. *Mildner* v. *Gulotta, supra.*

Indeed, the very structure of judicial disciplinary proceedings in most states would not pass constitutional muster under the criminal law. A Commission investigates, charges, designates a referee, and then determines —subject to review by the Court of Appeals—whether there has been misconduct. Appellant's constitutional challenge to that system was rejected in the Court of Appeals, and he does not raise any such issue before this

Court. Professional disciplinary proceedings conducted by an agency with investigative, charging and trial functions clearly are constitutional, the criminal law notwithstanding. *Withrow* v. *Larkin,* 421 U.S. 35 (1975).

Appellant's numerous references to a judicial disciplinary proceeding being "quasi-criminal" and the removal from office being "punitive" do not advance this discussion. Concededly, a judge has a liberty and property interest and is entitled to due process of law, but there is no precedent for the kind of wholesale transfer of criminal law rights he urges in his brief. Accordingly, the constitutional provision authorizing a greater sanction on a review initiated by a judge facing discipline is not unconstitutional on its face.

POINT III

There is no showing that the State Constitutional provision allowing an increased disciplinary sanction by the Court of Appeals was vindictive in its application to appellant.

In the case at bar, there was neither potential nor actual "vindictiveness," and thus none of appellant's rights was infringed. His brief argues that the Court of Appeals disclosed in its opinion that he was punished for exercising his right to challenge the charges (App. br. 24-25). The language in the Court of Appeals opinion which appellant believes shows actual, unconstitutional vindictiveness is (51 N.Y.2d at 404) (A 6a-7a):

> Compounding those four separate instances of impropriety, as the commission noted, is petitioner's continued insistence that his actions involved neither impropriety nor the appearance of impropriety. Judicial office, concerned as it is with concepts of reasonable care, arbitrariness, capriciousness, substantiality of evidence, excessiveness of discipline, involves a

> large measure of discretion. Public acceptance of the judicial product, however exemplary on a substantive level, cannot survive the acceptance of such invective and pressure politics as petitioner's conduct suggests. As in *Matter of Steinberg* (51 N.Y.2d 74, 84, *supra*), we conclude "that petitioner's complete insensitivity to the special ethical obligations of Judges [renders] him unfit for judicial service."

Such an argument distorts the rationale of the Court of Appeals, and ignores both the full rationale in support of the sanction and the function of a disciplinary system. Throughout the proceedings appellant demonstrated in innumerable ways that he had no understanding of what he had done or the serious consequences of a judge acting in such a reprehensible manner. The Court of Appeals did not criticize him for contesting the charges or seeking review. When a judge's entire defense and his statements throughout—from the initial stage of the proceeding to the final stage—manifest a total misunderstanding of a judge's role in society, and when the Court of Appeals reasonably concludes, based upon the full record before it, that such a judge does not know the difference between right and wrong as to basic standards of conduct, it may fairly conclude that removal from office is required. The Court also took into account a prior admonition of appellant "for having used profane, vulgar and inappropriate language in open court on several occasions in November 1976" (A 6a).

There is an irony to the argument that the Court of Appeals demonstrated actual vindictivness by its brief reference to "petitioner's continued insistence that his actions involved neither impropriety nor the appearance of impropriety." The Commission also had criticized appellant for showing "little or no understanding" (Appen. 6A) of the relevant ethical standards, and reasoned that appellant's "blatant impropriety [was] . . .

seriously compounded by his refusal in this record to acknowledge that his actions even appeared improper" (Appen. 6A). There is no suggestion that the Commission had been "vindictive" or had "retailated" for appellant's continued insistence that he had not engaged in misconduct. To fashion a showing of actual vindictiveness by the Court of Appeals on identical rationale used by both the Commission and the Court of Appeals is palpably absurd. Clearly, neither the Commission nor the Court of Appeals was being vindictive.

It is true that the Commission chose not to determine that appellant should be removed for his conduct. But the Court had the authority to disagree with the Commission and to impose an increased sanction, and it did. If a record on review discloses to the Court of Appeals that a judge is unfit for judicial office, the Court will order the judge's removal. That is the standard in New York (*Matter of Kane,* 50 N.Y.2d 360, 364 [1980] ["The petitioner has demonstrated his unfitness for judicial office"]; *Matter of Steinberg,* 51 N.Y.2d 74, 84 [1980] [" . . . petitioner's complete insensitivity to the special ethical obligations of judges rendered him unfit for judicial service"]), and the Court of Appeals concluded that on the record in this case appellant demonstrated "complete insensitivity" to the ethical obligations of a judge, and he was, thus, "unfit" for judicial service. 51 N.Y.2d at 404 (A 7a).

That appellant seems to confuse the distinctions between being removed *for* seeking review and being removed *as a consequence of* seeking review is reinforced by the opening paragraph (App. br. 24) to his point that the law violates due process in its application to him. There he states at some length that "[H]ad he not appealed . . ." he would have been censured. That is a truism but altogether irrelevant on the constitutional issues presented to this Court.

To make the point of actual vindictiveness he presents an analysis of other, unrelated cases, in which judges were treated "less severely" (App. br. 25, n.23). Because such an argument is not productive and not helpful to the issues before this Court, no detailed rebuttal is offered. These are cases decided on different facts. They involve different judges, and they were decided in a different forum. Moreover, appellant's situation is distinguishable from the others cited in his brief in that his misconduct occurred after he had been admonished for using profanity in court on other occasions.

CONCLUSION

The appeal should be dismissed in all respects because there is no substantial federal question meriting review by this Court. In the alternative, the order of the Court of Appeals, entered November 25, 1980, should be affirmed.

Respectfully submitted,

GERALD STERN
Counsel to Appellee
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New York, New York 10017
(212) 949-8860

Dated: New York, New York
April 17, 1981

APPENDIX

APPENDIX

Determination

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

NORMAN H. SHILLING,

a Judge of the Civil Court of the City of New York, Kings County.

BEFORE: Mrs. Gene Robb, Chairwoman
Honorable Fritz W. Alexander, II
David Bromberg
Honorable Richard J. Cardamone
Dolores DelBello
Michael M. Kirsch
Victor A. Kovner
Honorable Felice K. Shea
Honorable Isaac Rubin
Carroll L. Wainwright, Jr.

The respondent, Norman H. Shilling, a judge of the Civil Court of the City of New York, was served with a Formal Written Complaint dated June 4, 1979, alleging that he improperly interfered in the course of a proceeding before another judge and that he lent the prestige of his office to advance the interests of a third party, a not-for-profit corporation with which he was associated. Respondent filed an answer dated June 22, 1979.

Appendix—Determination

By order dated September 4, 1979, the Commission designated the Honorable James Gibson referee to hear and report with respect to the issues herein. Pursuant to Section 44, subdivision 4, of the Judiciary Law, respondent waived confidentiality in this proceeding and requested that any hearing be public.

By notice of motion dated September 19, 1979, respondent moved to dismiss the Formal Written Complaint for failure to state a cause of action. By order dated October 26, 1979, the Commission denied the motion.

A public hearing was held on October 29, 30, and 31 and November 1, 1979, and the report of the referee was filed on January 23, 1980.

By notice of motion dated February 1, 1980, the administrator of the Commission moved to confirm the referee's report and for a determination of misconduct and sanction. Respondent's opposition papers were filed on February 7, 1980.

The Commission heard oral argument on the issues herein on February 26, 1980. Thereafter, in executive session, the Commission considered the record of this proceeding, and now upon that record makes the following findings of fact.

1. In December, 1977, three summonses were issued against Mr. John Esteves, an employee of Associated Humane Societies of New Jersey (A.H.S.), who manages the A.H.S. facility at 224 Atlantic Avenue, Brooklyn, New York.

2. One summons was issued by the New York City Department of Health, charging operation of the Atlantic Avenue facility without a permit. The other two summonses were issued by agents of the American Society for the Prevention of Cruelty to Animals (A.S.P.C.A.), charging lack of health certificates for dogs shipped from New Jersey to New York, and lack of single cages for dogs over three months old.

3. Between December 1977 and December 1978, respondent contacted Dr. John Kullberg, Executive Director of the A.S.P.C.A., and Eric Plasa, Director, Humane Law Enforcement of the A.S.P.C.A.

4. In his telephone conversation with Dr. Kullberg, respondent identified himself as a judge and requested that Dr. Kullberg intercede and have the A.S.P.C.A. summonses dropped and the charges dismissed. Dr. Kullberg declined, and offered instead to have his agents make an unannounced visit to the A.H.S. facility, but respondent requested a visit with notice.

5. In his telephone conversation with Eric Plasa, respondent also asked for dismissal of the charges against Mr. Esteves.

6. Respondent also contacted Dr. Alan Beck of the New York City Department of Health, Bureau of Animal Affairs, and Dr. Howard Levin, Chief Veterinarian of the City Department of Health.

7. In his telephone conversations with Dr. Beck, respondent identified himself as a judge and questioned why the permit was not being granted to A.H.S. Dr. Beck told respondent that he was doubtful as to the wisdom of having New Jersey animals brought into New York City and vice versa, because of health, social and administrative problems. Respondent dismissed Dr. Beck's argument, became angry, and yelled and screamed at Dr. Beck to such an extent that Dr. Beck was not able to keep the phone to his ear.

8. In a subsequent telephone call to Dr. Beck, respondent was angry that the permit still had not been issued to A.H.S. Dr. Beck explained that the site was not zoned for a kennel, and respondent yelled, screamed and said

that Dr. Beck should "stop f-----g around with the Humane Society."

9. Respondent reminded Dr. Beck at least twice that respondent was a judge and also told Dr. Beck that he had more political clout than Dr. Beck. Dr. Beck perceived the telephone calls to be fraught with "attempted intimidation."

10. In his telephone conversation with Dr. Levin, respondent identified himself as a judge and asked, in a loud voice, to have the permit issued to A.H.S. Respondent questioned the reasons for the summons. He was upset and angry, and accused the Department of abusing its authortiy. Dr. Levin perceived respondent's tone of voice as "threatening."

11. On July 10, 1978, the case of *A.S.P.C.A. and New York City Department of Health* v. *Esteves* came before Judge Eugene Nardelli, sitting at New York City Criminal Court in Manhattan. After the case had been called, and while a settlement discussion was in progress at the bench, Judge Nardelli saw respondent sitting in the rear of the courtroom.

12. During the course of the settlement negotiations, Harry Brown, attorney for A.H.S. and Mr. Esteves, mentioned that respondent sat on the board of A.H.S.

13. After the *Esteves* matter was adjourned, respondent approached the bench and commented to Judge Nardelli about the case, to the effect that if the A.S.P.C.A. and Department of Health were really interested in animals, they would not be proceeding in such a manner. Judge Nardelli did not respond.

14. Respondent did not consider the impropriety of entering another judge's courtroom during the pendency of a case in which he was interested and talking to the presiding judge about the matter.

15. When the persons involved in the *Esteves* case left the courtroom, respondent also left. In the corridor, Mr. Brown introduced respondent to Dr. Levin. Respondent spoke to Dr. Levin about the permit and why it was being stopped. Dr. Levin replied that the problem was a zoning one. Respondent stated that zoning was not relevant, and that he had obtained this information from the building department. When Ms. Elinor Molbegott, attorney for the A.S.P.C.A., stated, "We will check into that," respondent said, "Listen, I am a judge of the Civil Court. When I make a statement of fact, it's a fact."

16. At the time of this conversation, respondent was angry and was talking in a loud tone of voice and waving his arms. Ms. Molbegott testified that respondent also made reference to "political friends." Dr. Levin considered respondent's tone to be "authoritative," perhaps "menacing."

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 33.1, 33.2(a), 33.2(c), 33.5(a) and 33.5(c)(1) of the Rules Governing Judicial Conduct and Canons 1, 2, 5A and 5C of the Code of Judicial Conduct. The charge in the Formal Written Complaint is sustained, and respondent's misconduct is established.

It was improper for respondent (i) to intercede in the *Esteves* case by attempting to persuade two officials of the A.S.P.C.A. with law enforcement authority to withdraw the summonses which commenced the proceeding and to have identified himself as a judge while so doing, (ii) to interfere on behalf of the A.H.S. with officials of the New York City Department of Health as to their decision not to issue a permit to A.H.S., to have identified himself as a

judge while so doing, and to have addressed the City officials in a hostile, profane and loud manner, (iii) to speak in a loud voice in the courthouse corridor with the attorney for the A.S.P.C.A. and to make reference to political influence, and (iv) to interfere in the court's consideration of the *Esteves* case by speaking to the presiding judge on behalf of the defendants. Judge Nardelli appropriately did not respond or allow himself to be engaged in conversation with respondent on this matter.

Respondent has exhibited a disturbing disregard of the ethical obligations required of all judges. He has used the prestige of his office to assert special influence on behalf of a third party and brought disrepute to the judiciary by his vulgar and abrasive public manner.

Respondent has shown little or no understanding of the standards of demeanor incumbent upon all judges as expressed in the Rules Governing Judicial Conduct. A judge's obligation to adhere to those standards is not limited to the courtroom. *Matter of Kuehnel* v. *State Commission on Judicial Conduct*, —NY2d— (Mar. 18, 1980).

The Commission finds the blatant impropriety respondent has evinced to be seriously compounded by his refusal in this record to acknowledge that his actions even appeared improper. Respect for the judiciary has been diminished both by respondent's conduct and the appearance of impropriety thereby engendered.

By reason of the foregoing, the Commission determines that the appropriate sanction is censure.

All concur.

CERTIFICATION

This is to certify that the foregoing is the determination of the State Commission on Judicial Conduct, containing findings of fact and conclusions of law required by Section 44, subdivision 7, of the Judiciary Law.

/s/ LILLEMOR T. ROBB
Lillemor T. Robb, Chairwoman
New York State Commission on
Judicial Conduct

Dated: April 9, 1980
Albany, New York

Appendix--Order

Order Rejecting The Determination

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the 25th day of November A. D. 1980

PRESENT, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

SCJC No. 488

In the Matter of Norman H. Shilling, a Judge of the Civil Court of the City of New York, Kings County,

Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

The State Commission on Judicial Conduct determined on April 9, 1980, that Norman H. Shilling should be censured;

That determination of the Commission, its findings of fact, its conclusions of law, and the record of the proceedings upon which the determination is based were transmitted on April 9, 1980 to the Chief Judge of the Court of Appeals in accordance with subdivision (a) of section 22 of Article 6 of the New York State Constitution and with Judiciary Law, Section 44, subdivision 7;

The service and notice requirements of New York State Constitution, Article 6, Section 22, subdivision (a) and of

Judiciary Law, Section 44, subdivision 7, were complied with on April 9, 1980 by certified mail, return receipt requested;

A request for review was made on April 15, 1980; this proceeding was heard by the Court on October 8, 1980; Now THEREFORE, in accordance with Article 6, Section 22, subdivision (d) of the New York State Constitution and with Judiciary Law, Section 44, subdivision 9, after due deliberation, it is

ORDERED that the determined sanction is rejected, without costs, the sanction of removal imposed and Norman H. Shilling removed from his office of Judge of the Civil Court of the City of New York, effective at midnight December 31, 1980, and, during the period between the date of service upon him of a copy of the order to be entered herein and December 31, 1980, he is suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service.

Opinion Per Curiam.

All concur except Fuchsberg, J., who dissents and votes to accept the determined sanction in an opinion.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

November 25, 1980

Mtr. of Shilling
Order of Removal

Appendix—Order

Order Imposing Sanction of Removal

COURT OF APPEALS
STATE OF NEW YORK

The Hon. Lawrence H. Cooke, Chief Judge, Presiding

SCJC No. 488

In the Matter of Norman H. Shilling, a Judge of the Civil Court of the City of New York, Kings County,

Petitioner,

For Review of a Determination of State Commission on Judicial Conduct,

Respondent.

The petitioner *in the above entitled appeal appeared by* Stanley D. Steinhaus; *the respondent appeared by* Gerald Stern, State Commission on Judicial Conduct.

The Court, after due deliberation, orders that the determined sanction is rejected, without costs, the sanction of removal imposed and Norman H. Shilling removed from his office of Judge of the Civil Court of the City of New York, effective at midnight December 31, 1980, and, during the period between the date of service upon him of a copy of the order to be entered herein and December 31, 1980, he is suspended, with pay, from office except to the extent necessary to complete matters begun but not completed by him at the time of such service. Opinion Per Curiam. All concur except Fuchsberg, J., who dissents and votes to accept the determined sanction in an opinion.

It is further ordered that the record of the proceedings be filed with the Clerk of this Court.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, November 25, 1980